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No. 16-1435

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In the
Supreme Court of the United States

MINNESOTA VOTERS ALLIANCE, et al.,
Petitioners,

v.

JOE MANSKY, et al.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Minnesota election law forbids voters from wearing political badges, political buttons, or other political insignia at the polling place. *See* Minn. Stat. § 211B.11. The ban broadly prohibits any material "designed to influence and impact voting," or "promoting a group with recognizable political views," even when the apparel makes no reference to any issue or candidate on the ballot.

The Eighth Circuit, aligned with the Fifth and D.C. Circuits, invoked *Burson v. Freeman*, 504 U.S. 191 (1992), to hold that a state can impose a "speech-free zone" without infringing on the Free Speech Clause of the First Amendment. There is deep tension between those decisions and the reasoning in decisions of the Fourth and Seventh Circuits, which hold that the First Amendment does not allow a state to prohibit all political speech.

The question presented is: Is Minnesota Statute Section 211B.11, which broadly bans all political apparel at the polling place, facially overbroad under the First Amendment?

LIST OF ALL PARTIES

Petitioners are Minnesota Voters Alliance, Andrew E. Cilek, and Susan Jeffers. All were plaintiffs in the courts below. Three other organizations, Minnesota Majority, Minnesota North Star Tea Party Patriots, Election Integrity Watch, which are no longer active, and one individual, Dan McGrath, were also plaintiffs below. Petitioners sent notices required by Supreme Court Rule 12.6 to Minnesota Majority, Minnesota North Star Tea Party Patriots, Election Integrity Watch, and Dan McGrath. Respondents are Joe Mansky, in his official capacity as the Elections Manager for Ramsey County; Virginia Gelms, in her official capacity as the Elections Manager for Hennepin County; Mike Freeman, in his official capacity as Hennepin County Attorney; John Choi, in his official capacity as Ramsey County Attorney; and Steve Simon, in his official capacity as Secretary of State. All were defendants in the proceeding below.

CORPORATE DISCLOSURE STATEMENT

Minnesota Voters Alliance is a nonprofit 501(c)(4) corporation incorporated under the laws of Minnesota. Minnesota Voters Alliance has no parent corporation, and no publicly held company owns 10% or more of its stock.

Table of Contents

QUESTION PRESENTED i

LIST OF ALL PARTIES ii

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 2

A. Factual Background 4

B. Procedural History 5

REASONS FOR GRANTING THE PETITION 9

I. THERE IS DEEP TENSION AMONG THE LOWER COURTS ON THE QUESTION OF WHETHER THE GOVERNMENT MAY IMPOSE A BLANKET BAN ON ALL POLITICAL SPEECH 10

A. The D.C. Circuit and the Fifth Circuit Share the Eighth Circuit's Expansive View of the Government's Power to Ban Speech 10

B. The Fourth Circuit and the Seventh Circuit Hold That a Complete Ban on Political Speech Cannot Be Reconciled with the First Amendment 13

C. The Oregon Court of Appeals and the United States District Court for the District of Arizona Have Invalidated Bans on Passive Political Speech at the Polling Place 15

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT 18

III. THIS CASE IS AN EXCELLENT VEHICLE FOR THIS COURT TO ADDRESS A RECURRING ISSUE CONCERNING CORE FIRST AMENDMENT RIGHTS 22

CONCLUSION 25

Appendix

A. Opinion of the Eighth Circuit, filed Feb. 28, 2017 ..... A-1

B. Opinion of the District Court, filed Mar. 23, 2015 ..... B-1

C. Interim Order of the District Court, filed Oct. 15, 2014 ..... C-1

D. Opinion of the Eighth Circuit, filed Mar. 13, 2013 ..... D-1

E. District Court Order, filed Apr. 29, 2011 ..... E-1

F. Order Denying Petition, filed May 7, 2013 ..... F-1

G. "Please I.D. Me" Button G-1

H. Tea Party T-Shirts H-1

I. Election Day Policy I-1

Table of Authorities

Cases

Bauer v. Shepard,
620 F.3d 704 (7th Cir. 2010) 15

Bd. of Airport Comm'rs v. Jews for Jesus, Inc.,
482 U.S. 569 (1987). 4, 18-19

Bd. of Trustees of the State Univ. of N.Y. v. Fox,
492 U.S. 469 (1989) 25

Buckley v. Valeo,
424 U.S. 1 (1976) 13

Burson v. Freeman,
504 U.S. 191 (1992) ..... passim

Byrne v. Rutledge,
623 F.3d 46 (2d Cir. 2010) 20

CBS Inc. v. Smith,
681 F. Supp. 794 (S.D. Fla. 1988) 21

Citizens for Police Accountability Political Comm. v. Browning, 572 F.3d 1213 (11th Cir. 2009) 13

Clean-Up '84 v. Heinrich,
759 F.2d 1511 (11th Cir. 1985) 23

Daily Herald Co. v. Munro,
838 F.2d 380 (9th Cir. 1988) 21

Eu v. San Francisco Cty. Democratic Cent. Comm.,
489 U.S. 214 (1989) 21

Florida Comm. for Liability Reform v. McMillan,
682 F. Supp. 1536 (M.D. Fla. 1988) 19

Garrison v. Louisiana,
379 U.S. 64 (1964) 20

Gitlow v. New York,
268 U.S. 652 (1925) 10

Heffron v. Int'l Soc'y for Krishna Consciousness Inc.,
452 U.S. 640 (1981) 23

Marlin v. D.C. Bd. of Election & Ethics,
236 F.3d 716 (D.C. Cir. 2001) 6, 10-11, 19

Minnesota Majority v. Mansky,
134 S. Ct. 824 (2013) 8, 25

Minnesota Majority v. Mansky,
No. 10-cv-04401 (D. Minn. Mar. 23, 2015)
(order granting Defendants' motions for
summary judgment) 1

Minnesota Majority v. Mansky,
62 F. Supp. 3d 870 (D. Minn. 2014) 1

Minnesota Majority v. Mansky,
708 F.3d 1051 (8th Cir. 2013) 1, 7

Minnesota Majority v. Mansky,
789 F. Supp. 2d 1112 (D. Minn. 2011) 1

Minnesota Majority v. Mansky,
849 F.3d 749 (8th Cir. 2017) 1, 24

Mount Soledad Mem'l Ass'n v. Trunk,
132 S. Ct. 2535 (2012) 25

NAACP v. Button,
371 U.S. 415 (1963) 18

North Carolina Right to Life, Inc. v. Bartlett,
168 F.3d 705 (4th Cir. 1999) 13-14

Perry Educ. Ass'n v. Perry Local Educators' Ass'n,
460 U.S. 37 (1983) 20

Picray v. Secretary of State,
140 Or. App. 592 (1996), *aff'd by an equally divided court*, 325 Or. 279 (1997) 16-18, 22

Reed v. Purcell, No. 10-CV-2324, 2010
WL 4394289 (D. Ariz. Nov. 1, 2010) 15-16, 23

Schirmer v. Edwards,
2 F.3d 117 (5th Cir. 1993) 7, 11-13

Thomas v. Collins,
323 U.S. 516 (1945) 14

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553 U.S. 285 (2008) 18

United States v. Stevens,
559 U.S. 460 (2010) 18

Virginia v. Hicks,
539 U.S. 113 (2003) 9

Washington State Grange v. Washington State Republican Party, 552 U.S. 442 (2008). 18

Wisconsin Right to Life, Inc. v. Barland,
751 F.3d 804 (7th Cir. 2014). 14-15

Constitution

Or. Const. art. I, § 8 17

Federal Statutes

28 U.S.C. § 1257 1

State Statutes

Ariz. Rev. Stat. § 16-515 15

Del. Code Ann. tit. 15 § 4942 22

Kan. Stat. Ann. § 25-2430(a) 22

Minn. Stat. § 211B.04 4

Minn. Stat. § 211B.11 ..... passim

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Minn. Stat. § 211B.11, subd. 4 4

Minn. Stat. § 211B.15 4

Minn. Stat. § 211B.35, subd. 2(d) 4

Mont. Code Ann. § 13-35-211(1) 22

N.J. Stat. Ann. § 19:34-19 22

N.Y. Elec. Law § 8-104(1) 22

Or. Rev. Stat. § 260.695(4) 17

S.C. Code Ann. § 7-25-180(B) 22

Tenn. Code Ann. § 2-7-111(b)(1) 22

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Miscellaneous

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MIT Voters Flagged at Polls for Suspected Electioneering, Explain They're Not Shilling for Mitt Romney, (Nov. 6, 2012), http://www.huffingtonpost.com/2012/11/06/mit-voters-flagged-at-polls-for-suspected-electioneeringexplain-not-shilling-for-romney_n_2084332.html 23

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Making Sense of Overbreadth, 100 Yale L.J. 853 (1991) 23

Fischer, Roger A.,
Tippecanoe and Trinkets Too (1988) 18

The Federalist
No. 48 (J. Madison) (J. Cooke ed., 1961). 21

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"You Can't Wear That to Vote": The Constitutionality of State Laws Prohibiting the Wearing of Political Message Buttons at Polling Places, 32 T. Marshall L. Rev. 61 (2006). 22

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Freedom of Speech & Election Day at the Polls: Thou Doth Protest Too Much, 65 Mercer L. Rev. 331 (2014) 22-23

PETITION FOR A WRIT OF CERTIORARI

Petitioners Minnesota Voters Alliance, Andrew E. Cilek, and Susan Jeffers respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Eighth Circuit affirming final judgment against Petitioners is reported at 849 F.3d 749 (8th Cir. 2017), and reprinted in Appendix A. The related opinion of the district court rejecting Petitioners' as-applied challenge and entering final judgment is unreported, but may be found at 0:10-cv-04401-JNE-SER, ECF No. 167 (D. Minn. Mar. 23, 2015), and is reprinted in Appendix B. An interim order of the district court, granting Defendant Mark Ritchie's motion for summary judgment in part, and denying the motion in part, is reported at 62 F. Supp. 3d 870 (2014), and reprinted in Appendix C. The Eighth Circuit's opinion rejecting Petitioners' facial challenge is reported at 708 F.3d 1051 (8th Cir. 2013), and reprinted in Appendix D. The Eighth Circuit's denial of rehearing en banc, over the dissent of Judge Smith and Judge Shepherd, on May 7, 2013, is reprinted in Appendix F. The district court opinion rejecting the facial challenge is reported at 789 F. Supp. 2d 1112 (D. Minn. 2011), and reprinted in Appendix E.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered final judgment in this case on February 28, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1257.

CONSTITUTITIONAL AND STATUTORY PROVISIONS AT ISSUE

The First Amendment, as incorporated against the states by the Fourteenth Amendment, provides that the states "shall make no law . . . abridging the freedom of speech."

Minnesota Statute Section 211B.11 provides, in relevant part: "A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day."

STATEMENT OF THE CASE

This case presents an important and frequently recurring question of law: Does a statute that creates a "speech-free zone" at the polling place violate the First Amendment? Minnesota Statute Section 211B.11 forbids voters from wearing any kind of "political badge, political button, or other political insignia" at "the polling place on primary [and] election day." Minnesota defines "political" as "[i]ssue oriented material designed to influence or impact voting" and "[m]aterial promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)." App. I-1–I-2. Petitioner Andrew Cilek, a Minnesota voter, was temporarily prevented from voting for wearing two items of political apparel: A t-shirt that states "Don't Tread on Me," with a picture of the Gadsden Flag and a small Tea Party logo; and an Election Integrity Watch

(EIW)[1] button that states "Please I.D. Me" with EIW's website and phone number. App. G-1, H-1–H-2.

The Eighth Circuit upheld the Minnesota law, holding that it did not violate the overbreadth doctrine of the First Amendment. App. D. The decision below aligns with the D.C. Circuit and the Fifth Circuit to hold that the government has *carte blanche* to ban political speech near polling places. By contrast, the Fourth and Seventh Circuits recognize that, regardless of location, a total ban on all speech the government deems "political," without any limiting principle, violates the First Amendment's overbreadth doctrine. The reasoning of those decisions would plainly invalidate the political apparel ban here. Moreover, the Oregon Court of Appeals and United States District Court for the District of Arizona have invalidated nearly identical laws as inconsistent with voters' free speech rights.

Resolution of the question presented is a matter of tremendous nationwide importance. Nine other states have nearly identical political apparel bans, *see infra* n.10, and Respondents candidly acknowledge that every state in the Union has created "speech-free zones."

"Speech-free zones" cannot be reconciled with the First Amendment's Free Speech Clause. Although this Court has permitted *campaign*-free zones that prohibit campaign materials and active solicitation, *see Burson*, 504 U.S. at 193-94, it has never endorsed a ban on all political speech. Instead, under this

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[1] EIW was a joint project of three nonprofits: Minnesota Voters Alliance, Minnesota Majority, and North Star Tea Party Patriots. It is now defunct.

Court's precedents, a "virtual First Amendment Free Zone" in any forum, public or nonpublic, plainly violates the First Amendment. *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 574 (1987).

A. Factual Background

Minnesota Election Code Chapter 211B prescribes a set of "Fair Campaign Practices," such as disclaimers on campaign literature, Minn. Stat. § 211B.04, and limits on corporate political contributions, Minn. Stat. § 211B.15. Section 211B.11, entitled "Election day prohibitions," bans various activities "near polling places." As relevant here, the third sentence of the statute provides that "[a] political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day." *Id.*, subd. 1. Voters who violate this law are subject to the criminal penalties assessed for a petty misdemeanor, Minn. Stat. § 211B.11, subd. 4, and civil penalties of up to $5,000. Minn. Stat. § 211B.35, subd. 2(d).

Because the text of the statute itself does not define "political," Minnesota election officials, including the Secretary of State, the Ramsey County Election Manager, and the Hennepin County Election Manager, distributed an Election Day Policy in 2010 to help election judges make this determination. App. I. The Policy bans not only campaign-related material that advocates for the election of a candidate or the passage of a ballot initiative, but also "[i]ssue oriented material designed to influence and impact voting (including specifically the 'Please I.D. Me' buttons)" and "[m]aterial promoting a group with recognizable political views (such as the Tea Party, MoveOn.Org, and so on)." App. I-1–I-2. Election

judges enforcing the Policy, including Petitioner Susan Jeffers, were instructed to allow perceived violators to vote, but also to record their names and addresses for potential prosecution. App. I-2–I-3.

Petitioner Andrew Cilek is a registered voter and Executive Director of the Minnesota Voters Alliance, a 501(c)(4) organization that seeks better government through election reforms. App. D-2, E-2–E-3. Just before the November 2010 election, Minnesota Voters Alliance joined forces with North Star Tea Party Patriots and Minnesota Majority to form Election Integrity Watch (EIW), "a grass roots effort to protect election integrity." App. E-16. None of these 501(c)(4) organizations "endorse[d] a candidate or ballot issue in the November 2010 Election." App. D-2, E-2–E-3. EIW produced a button that stated "Please I.D. Me" and included an image of a human eye, along with EIW's telephone number and website address. App. D-2.

During the November 2010 election, Cilek entered his polling place in Hennepin County wearing a "Please I.D. Me" button and a t-shirt made by the North Star Tea Party Patriots. The t-shirt featured a relatively small Tea Party logo alongside the shirt's primary message, "Don't Tread on Me," and an image of the Gadsden Flag. App. H-1 (exhibit of prohibited Tea Party shirts). An election worker twice refused to allow Cilek to vote because these items are prohibited by Minnesota Statute Section 211B.11. *See* App. E-7.

B. Procedural History

Shortly after the November 2010 election, Petitioners filed their First Amended Complaint, alleging that Minnesota Statute Section 211B.11, both

on its face and as-applied to Petitioners, violated the First Amendment. As relevant here, Petitioners objected that the ban on all "political" apparel, including Tea Party t-shirts and "Please I.D. Me" buttons, was substantially overbroad under the First Amendment.[2] Petitioners sought declaratory and injunctive relief against various state officials who prevented eligible voters from wearing buttons or clothing that did not endorse candidates or ballot questions in the polling place on Election Day. App. A-4–A-5.

The district court dismissed the case. The court acknowledged that the organizational plaintiffs, such as the North Star Tea Party Patriots and Election Integrity Watch, "do not endorse candidates" App. E-3. It also noted that with respect to the "Please I.D. Me" buttons, "there was no issue relating to voter identification on the November 2, 2010 ballot." App. E-3–E-4. Yet the district court, citing this Court's decision in *Burson v. Freeman* and the D.C. Circuit's decision in *Marlin v. D.C. Bd. of Election & Ethics*, 236 F.3d 716 (D.C. Cir. 2001), upheld Minnesota's political apparel ban. App. E-11–E-14, E-16–E-18, E-22–E-24, E-29. Addressing Petitioners' facial overbreadth argument, the court, relying on *Marlin*, concluded that a ban on apparel "expressing political ideology or beliefs, even those unrelated to a candidate or a ballot question," falls "within the [statute's] legitimate sweep." App. E-29.

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[2] Besides Cilek's Gadsden Flag shirt, many other t-shirts were banned under Minnesota Statute Section 211B.11, including shirts with slogans such as "liberty," "Tea Party Patriots," or a picture of a Tea Party shield. *See* App. B-24–B-25.

On appeal, the government embraced the State's broad ban on "political" apparel. Dispelling any notion that Minnesota's ban was limited to the insignia at issue in this case, the government conceded that the statute also reaches the apparel of other organizations, such as the Chamber of Commerce and the AFL-CIO. Oral Argument at 19:48, *Minnesota Majority v. Mansky*, 708 F.3d 1051 (8th Cir. 2013) (No. 11-2125).[3]

In a split decision, the Eighth Circuit upheld the ban against Petitioners' facial claim.[4] App. D. Relying on *Burson* and decisions of the D.C. Circuit, Fifth Circuit, and Eleventh Circuit, the panel held that even though the apparel did not belong to a "political party" or "endorse[] a candidate or ballot issue," a blanket ban on such apparel was nonetheless a constitutional means to further the government's interest in maintaining "peace, order, and decorum" at the polling place. App. D-2, D-8 (internal quotations omitted). Indeed, the panel suggested that even a "total ban on politicking," including "buttons and T-Shirts" within a 600-foot radius of the polling place would pose no constitutional problem. App. D-10. (citing *Schirmer v. Edwards*, 2 F.3d 117, 122-23 (5th Cir. 1993)).

Judge Shepherd, dissenting in relevant part, objected to the majority's sweeping conclusion that a categorical ban on all political insignia is "reasonable in light of the need to maintain 'peace, order and decorum,' to 'protect[ ] voters from confusion and

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[3] http://media-oa.ca8.uscourts.gov/OAaudio/2012/2/112125.MP3.

[4] The Eighth Circuit Court reversed the district court's order dismissing the Petitioners' as-applied claim and remanded that claim to the district court. App. D-11–D-12.

undue influence,' and to 'preserv[e] the integrity of its election process' in the polling place." App. D-15 (alterations in original). He explained that *Burson* does not justify a ban on *all* political insignia in the polling place because this Court explicitly limited its holding to political insignia that endorsed either a candidate or a ballot issue in the election. App. D-16–D-17 (noting that the law in *Burson* banned only "the display of *campaign* posters, signs, or other *campaign* materials, distribution of *campaign* materials, and the solicitation of votes for or against any person or political party or position"). Finally, Judge Shepherd was considerably less sanguine about the implications of the panel's decision, observing that he simply could "not accept" the government's insistence that "the presence of a passive and peaceful voter who happens to wear a shirt displaying" merely the name of an organization, such as "'American Legion,' 'Veterans of Foreign Wars,' 'AFL-CIO,' 'NRA,' 'NAACP,' or the logo of one of these organizations (all of which have actively participated in the political process) somehow causes a disruption in the polling place or confuses or unduly influences voters." App. D-18 n.7.

Petitioners filed a petition for a writ of certiorari, arguing that the Minnesota statute is overbroad and has the effect of chilling protected speech. Petition for Writ of Certiorari, *Minnesota Majority v. Mansky*, 134 S. Ct. 824 (2013) (No. 13-185). After this Court called for a response, the State opposed certiorari, principally on the ground that "review of Petitioners' facial challenge [was] not appropriate because Petitioners' as-applied challenge [was] still pending." Opposition to Petition for Writ of Certiorari at 1, 9. The Court denied certiorari and the case proceeded in district court. On February 28, 2017, the Eighth

Circuit rejected Petitioners' as-applied challenge. This Petition, limited to the facial overbreadth claim, follows.

REASONS FOR GRANTING THE PETITION

This case presents the question of whether government may impose a blanket ban of all speech that it deems "political." In conflict with the reasoning of the Fourth Circuit and the Seventh Circuit; and the holdings of the Oregon Court of Appeals and the United States District Court for the District of Arizona; but in agreement with the D.C. Circuit and the Fifth Circuit, the Eighth Circuit held that speech-free zones raise no free speech problems.

The decision below should not stand. In *Burson v. Freeman*, this Court upheld a Tennessee statute that banned the "solicitation of votes" and "*campaign* materials" within 100 feet of the polling place. *Burson*, 504 U.S. at 193-94 (emphasis added). Although the Eighth Circuit joined the Fifth and D.C. Circuits in extending this Court's decision in *Burson* to ban passive political speech unrelated to candidates or ballot initiatives, *Burson* plainly does not endorse a categorical ban on *all* types of "political" speech.

Instead, a law is unconstitutionally overbroad if it punishes a substantial amount of protected free speech, judged in relation to the amount of speech that the government may legitimately curtail. *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003). The decision below departs from this Court's precedent on First Amendment overbreadth and effectively chills the free speech rights of millions of voters across the country by threatening criminal prosecution or civil penalties for voters who wear logoed t-shirts, caps, jackets,

buttons, and other apparel in state-declared speech-free zones.

I

THERE IS DEEP TENSION AMONG THE LOWER COURTS ON THE QUESTION OF WHETHER THE GOVERNMENT MAY IMPOSE A BLANKET BAN ON ALL POLITICAL SPEECH

The lower courts disagree on the issue presented: Does the First Amendment's Free Speech Clause permit the government to create categorical speech-free zones at the polling place?[5] In *Burson v. Freeman*, this Court endorsed a ban on campaign-related speech at the polling place. *Burson*, 504 U.S. at 193. Yet, although *Burson* upheld only some election-specific limits on speech, some states have read the decision as an unqualified mandate to ban all speech under the guise of regulating elections. This Court's guidance on this matter would thus clarify the bounds between election law and the First Amendment for voters nationwide.

A. The D.C. Circuit and the Fifth Circuit Share the Eighth Circuit's Expansive View of the Government's Power to Ban Speech

The Eighth Circuit expressly relied on the D.C. Circuit's decision in *Marlin v. D.C. Bd. of Elections and Ethics*, 236 F.3d 716, to uphold Minnesota's political apparel ban. In *Marlin*, the D.C. Circuit considered a District of Columbia regulation

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[5] The First Amendment has been incorporated against the states by Section 5 of the Fourteenth Amendment. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).

providing that "no partisan or nonpartisan political activity . . . shall be permitted in, on, or within a reasonable distance outside the building used as a polling or vote counting place." *Id.* at 718. Like Minnesota's political apparel ban, the District's election regulation in *Marlin* defined "political activity" to "include without limitation, any activity intended to persuade a person to vote for or against any candidate or measure or to desist from voting." *Id.* (citing 3 D.C.M.R. § 708.8).

The D.C. Circuit upheld the statute, reasoning that because a polling place was a nonpublic forum, it need not be "available for general public discourse *of any sort*." *Id.* at 719 (emphasis added). Relying on *Burson*, the court reasoned that a speech ban comports with the First Amendment as long as "the only expressive activity" it allows is "carried out privately—by secret ballot in a restricted space." *Id.* The D.C. Circuit hastily concluded that the District's ban was a reasonable means by which to further governmental interests in orderly voting, and in boilerplate fashion, recited that even if "narrower regulations might be as effective or more so," that does "not invalidate the means the District has chosen." *Id.* at 720.[6]

The Fifth Circuit also countenances speech-free zones near polling places. In *Schirmer v. Edwards*,

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[6] *Marlin* involved an as-applied challenge, but the D.C. Circuit found no constitutionally significant distinction between as-applied and facial challenges in analyzing whether a political speech ban is reasonable. *Marlin*, 236 F.3d at 720 n.5. The *Marlin* court's reasoning would uphold the Minnesota political apparel ban in this case. *Id.* at 719 (government is permitted to create forum in which the "only expressive activity" is voting).

2 F.3d 117 (5th Cir. 1993), the court upheld a Louisiana statute that imposed a "total ban on politicking," including "buttons and T-Shirts," within a 600-foot radius of the polling place. *Id.* at 122-23 (citing Louisiana statute that makes it illegal to "place or display political signs, pictures, or other forms of political advertising"). The *Schirmer* plaintiffs alleged that the Louisiana statute was facially overbroad because it banned both political speech concerning individuals not on the ballot and passive political speech such as buttons and t-shirts that carried no campaign-related message. *Id.* at 122. Although the Fifth Circuit recognized that the ban "singles out and sanctions public discourse on politics—an area deep within the confines of the First Amendment," *id.* at 120, it believed that voters must "compromise" their First Amendment rights to free speech so that the State can create "an environment free from intimidation, harassment, confusion, obstruction, and undue influence." *Id.* at 119.

Like the D.C. Circuit, the Fifth Circuit relied on *Burson* in upholding the Louisiana ban. The court noted that "the only known reference [in *Burson*] with regard to proscribing non-ballot campaigning around polling areas" came from isolated statements in Justice Stevens's dissent. Yet the Fifth Circuit believed that those statements suggested that this Court "would be more comfortable with an across the board ban on politicking in the campaign-free zone" to prevent "on-the-spot enforcement decisions about what was proscribed by the statute" and the need for "increased security . . . to weed out those engaged in ballot related speech." *Id.* at 123. In all, the Fifth Circuit concluded that a "total ban on politicking" was the "most defensible position" the State could adopt,

and one that "demonstrate[d] a reasonable compromise" between free speech rights and the State's interests in speech-free zones. *Id.* at 123-24.[7]

B. The Fourth Circuit and the Seventh Circuit Hold That a Complete Ban on Political Speech Cannot Be Reconciled with the First Amendment

In tension with the reasoning of decisions by the D.C. Circuit, Fifth Circuit, and Eighth Circuit, two circuit courts hold that a broad ban on political speech cannot be reconciled with the First Amendment. In invalidating state electioneering statutes, the Fourth and Seventh Circuits relied on this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), just as seven members of the Court did in *Burson*. *See Burson*, 504 U.S. at 206-07 (plurality opinion); *id.* at 217 (Stevens, J., dissenting).

The Fourth Circuit held that an unlimited ban on political speech was substantially overbroad under the First Amendment. In *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), the court invalidated two provisions of the North Carolina election code that subjected groups which neither supported nor opposed candidates for office to an intrusive set of reporting requirements. *Id.* at 712-13. The Fourth Circuit held that the statute was overbroad because it "blanket[ed] with uncertainty" the entire field of campaign politics, thereby

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[7] The Eighth Circuit also suggested that the Eleventh Circuit's decision in *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1218-19 (11th Cir. 2009), endorsed the outcome below. While *Browning* may be distinguishable on the ground that it involved solicitation, if the Eighth Circuit is correct, it would only add to the tension among the lower courts.

"compel[ling] the speaker to hedge and trim." *Id.* at 713 (quoting *Thomas v. Collins*, 323 U.S. 516, 535 (1945)). It added that a law so severely burdening political speech was "unacceptable in an area of such crucial import to our representative democracy." *Id.* The same can be said of Minnesota's political apparel ban.

The Fourth Circuit also examined a statute that prohibited corporate expenditures or contributions for a "political purpose." *Id.* The court noted that although this Court permits "[r]egulation of corporate political activity," that jurisprudence reflects concern about "the potential for unfair deployment of wealth for political purposes," a concern that is "not omnipresent." *Id.* Rather than simply "reiterating [a] general concern," *id.*, the Fourth Circuit conducted a more nuanced analysis and held that by making "no exception for nonprofits that present a minimal risk of distorting the political process," the statute was substantially overbroad under the First Amendment. *Id.* at 714.

The Seventh Circuit reached a similar result in *Wisconsin Right to Life, Inc. v. Barland*, 751 F.3d 804 (7th Cir. 2014). In that case, Wisconsin election laws defined "political purpose" as the "*purpose of influencing the election or nomination*" of any individual, and a "political committee" as "every committee which is formed primarily to *influence elections*." *Id.* at 833. The court regarded the "influence an election" language as the kind of "broad and imprecise language" that "risk[s] chilling" protected speech, and noted that a narrowing construction of the statute was required to cure

"persistent [ ] overbreadth" and conform the law with the First Amendment. *Id.*

The circuit courts are thus in tension on an issue of nationwide importance. Because the cases above lack any constitutionally significant difference, the lower courts cannot "create harmony" on the question presented. *See Bauer v. Shepard*, 620 F.3d 704, 710 (7th Cir. 2010).

C. The Oregon Court of Appeals and the United States District Court for the District of Arizona Have Invalidated Bans on Passive Political Speech at the Polling Place

Two other courts have invalidated statutes virtually identical to Minnesota Statute Section 211B.11 on grounds that such statutes are inconsistent with the right to free speech. In *Reed v. Purcell*, No. 10-CV-2324, 2010 WL 4394289 (D. Ariz. Nov. 1, 2010), a federal district court in Arizona entered a temporary restraining order enjoining Arizona's political apparel ban. That ban specified that "no political or electioneering materials may be displayed within" seventy-five feet of a polling place. *Id.* at *1 (citing Ariz. Rev. Stat. § 16-515). Mark Reed, an Arizona voter, sought to vote in the State's 2010 election while wearing a t-shirt that stated "Tea Party: Principles Not Politicians," with the insignia "Don't Tread on Me." *Id.* An Arizona Elections Director instructed poll workers to require anyone wearing a "Tea Party" t-shirt to remove or cover the shirt before voting, despite the fact that the "Tea Party" was not recognized as a political party in Arizona and did not appear on the ballot. *Id.*

Reed moved for a temporary restraining order, alleging that Arizona's political apparel law "infringe[d] on [his] First Amendment rights by prohibiting [him] from voting while wearing a 'tea party' t-shirt." *Id.* Although the court did not explicitly enjoin the law on overbreadth grounds, it plainly conducted the same analysis that courts conduct in overbreadth cases. *See id.* at *4. For instance, the court was troubled by enforcement of Arizona's political apparel ban against voters who wear shirts that make "no mention of express support or opposition of any candidate on the ballot, party on the ballot, or proposition on the ballot." *Id.* The court prohibited the State from enforcing the statute because it could not "derive any clear standard from [ ] a case-by-case adjudication" of which shirts could be banned as "political" apparel. *Id.* Finally, the court expressed concern that the broad discretion given to election officials under Arizona's political apparel ban "chills protected First Amendment expression." *Id.* After all, "[m]essages pertinent to the election can be found everywhere if one looks hard enough," and even "a red and blue t-shirt may be prohibited because of the association of the color with the two major [political] parties." *Id.* The court granted the plaintiff's motion for a temporary restraining order. *See id.* at *5-6. Petitioners in this case could have worn a Tea Party t-shirt to the polling place if they lived in Arizona. The only reason they could not do so in Minnesota is because they lived on the other side of the conflict.

The Oregon Court of Appeals reached a similar result in *Picray v. Secretary of State*, 140 Or. App. 592 (1996), *aff'd by an equally divided court*, 325 Or. 279 (1997). There, the court overturned a penalty imposed

under an Oregon statute that prohibited voters from wearing "political badge(s), button(s) or other insignia in polling places." *Id.* at 594 (citing Or. Rev. Stat. § 260.695(4)). The petitioner appeared at a polling place wearing two buttons, each approximately two inches in diameter, that criticized the Oregon Citizens Alliance, a major proponent of a ballot initiative. *Id.* Petitioner appealed after the State levied a $100 fine against him for violating Oregon's political apparel ban. *Id.* The Oregon court was asked to reconcile the Oregon Constitution's protection for free expression, *see* Or. Const. art. I, § 8,[8] and the State's role in regulating elections, just as federal courts must reconcile the First Amendment's protections for free speech and a state's role in regulating elections.

In reversing the fine, the court of appeals noted that the mere passive display of a political button or badge in a polling place constitutes "the silent expression of political opinion" and does not coerce or unduly influence anyone. *Picray*, 140 Or. App. at 600. While acknowledging the legislative prerogative in protecting voters from "undue influence" and "improper conduct," the court noted that both "are terms of constitutional limitation" and that the legislature cannot claim "absolute authority to prohibit any and all conduct relating to elections." *Id.* at 601. Referencing the historical approval of passive political speech, from "medalets, thread boxes, and bandanas promoting Andrew Jackson or John Quincy Adams in 1828 through [modern buttons and] bumper stickers[,]" the court held that the Oregon political apparel ban exceeded this constitutional limitation.

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[8] The Oregon Constitution provides that "No law shall be passed restraining the free expression of opinion . . . ."

Id. at 601 n.12 (citing Roger A. Fischer, *Tippecanoe and Trinkets Too* vii-viii (1988)). Petitioners in this case plainly could have voted with their t-shirts and buttons without issue if they had been residents of Oregon, but because they lived in Minnesota they could not.

II

THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT

Laws are overbroad and thus unconstitutional under the First Amendment if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473 (2010) (citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6 (2008)). As this Court has explained, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate [ ] only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). If it were otherwise, a series of cases challenging specific applications of a law would result in a "chilling effect . . . on protected speech" during the proceedings. *Jews for Jesus*, 482 U.S. at 576.

"The first step in overbreadth analysis is to construe the challenged statute." *United States v. Williams*, 553 U.S. 285, 293 (2008). Here, the statute prohibits voters from wearing "political badge[s], political button[s], or other political insignia" at "the polling place on primary or election day." Minn. Stat. § 211B.11. The Election Day Policy clarifies that Minnesota's sweeping ban covers "[i]ssue oriented material designed to influence or impact voting" and

"[m]aterial promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)." The government conceded that the statute reaches apparel displaying logos from groups like the Chamber of Commerce and the AFL-CIO. And Judge Shepherd's dissent below (unanswered by either the panel or the Respondents) observed that the statute would apply to badges, buttons, or other insignia of the American Legion, Veterans of Foreign Wars, AFL-CIO, National Rifle Association, and the NAACP. App. D-18 n.7.[9]

As a result, Minnesota Statute Section 211B.11 creates a zone in which "the only expressive activity" permitted is "carried out privately—by secret ballot in a restricted space." *Marlin*, 236 F.3d at 719. Or, in this Court's parlance, a "virtual First Amendment Free Zone." *Jews for Jesus*, 482 U.S. at 574 (internal quotation marks omitted). "[B]ecause no conceivable governmental interest" could justify "such an absolute prohibition on speech," *id.* at 575, this Court may invalidate Minnesota's sweeping speech ban on overbreadth grounds regardless of whether the forum is public or nonpublic. *See id.* at 573-74.

Even if a polling place is a nonpublic forum, Minnesota Statute Section 211B.11 is still unconstitutionally overbroad. Speech restrictions in a nonpublic forum must be "reasonable in light of the

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[9] Respondents have never argued that there is some "principled manner by which to narrow the plainly overbroad language." *See Florida Comm. for Liability Reform v. McMillan*, 682 F. Supp. 1536, 1540-41 (M.D. Fla. 1988) (enjoining a statute that forbids "soliciting or attempting to solicit any" opinion "for any purpose" despite defendants' contention that taking the plain text at face value would be "silly").

purpose which the forum at issue serves." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). Thus, Minnesota Statute Section 211B.11 must be "consistent with" a "legitimate [governmental] interest[]" or ruled unconstitutional. *Id.* at 50. Throughout this litigation, Respondents have produced no more than conclusory statements that a ban on all political badges, buttons, and insignia furthers Minnesota's interest in conducting orderly elections.

What is more, the statute often requires election officials to rely on their own subjective judgments about whether certain apparel falls within the ambit of the law's ban on "political" speech. *See* Oral Arg. at 19:48 (No. 11-2125) (government's concessions that the statute bans political apparel from groups beyond those explicitly named in the Election Day Policy). Where an election official's subjective view might often diverge from the "objective meaning a third-party may ascribe" to apparel, a court will invalidate a statute—even under the reasonableness standard. *See Byrne v. Rutledge*, 623 F.3d 46, 59-61 (2d Cir. 2010) (invalidating State's denial of motorist's requested vanity license plate). If courts do not hesitate to protect vanity plates from unreasonable speech restrictions, then surely they should protect one's right to engage in political discourse—"the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

This Court's decision in *Burson v. Freeman* does not dictate otherwise. There, this Court did not retreat from the heightened protection that the First Amendment affords political speech. Instead, it reiterated that "[t]he First Amendment has its fullest

and most urgent application to" political speech. 504 U.S. at 196 (quoting *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989)). The decision in *Burson*, upholding a ban on campaign materials, was animated by concerns of election fraud and voter intimidation; concerns that do not exist with the non-campaign apparel at issue here. *See id.* at 201-06 (describing early problems with voter fraud and intimidation in the polling place). Moreover, the *Burson* plurality recognized that, at some point, "government regulation . . . could effectively become an impermissible burden" on speech. *Id.* at 210. Minnesota's legislature may not simply point to *Burson* to extend the sphere of its apparel ban, allowing the state to draw all apparel it deems political "into its impetuous vortex." The Federalist No. 48, at 333 (J. Madison) (J. Cooke ed., 1961).

In practice, enforcement of bans that do not further a state's interest in orderly elections comes at the expense of laws that do. Lower courts invalidating speech restrictions have pointed to many state laws that actually further an interest in orderly elections, such as those that empower the deputy sheriff to maintain "good order" at the polls, or prohibit the deprivation of voting rights. *CBS Inc. v. Smith*, 681 F. Supp. 794, 804 (S.D. Fla. 1988) (citing Florida statutes). States could also achieve the goal of preventing voter harassment by arranging polling places with separate entrances and exits and limiting the ability of people to approach voters on their way into the polls. *See Daily Herald Co. v. Munro*, 838 F.2d 380, 385 (9th Cir. 1988). These examples show that states interested in conducting orderly elections may focus their resources on alternatives that actually

further that interest, rather than broadly suppressing speech.

III

THIS CASE IS AN EXCELLENT VEHICLE FOR THIS COURT TO ADDRESS A RECURRING ISSUE CONCERNING CORE FIRST AMENDMENT RIGHTS

The issue presented is important, widespread, and recurring. At least nine other states have taken *Burson* as an unqualified mandate to enact broad political apparel bans at the polling place. *See* Kimberly J. Tucker, *"You Can't Wear That to Vote": The Constitutionality of State Laws Prohibiting the Wearing of Political Message Buttons at Polling Places*, 32 T. Marshall L. Rev. 61, 63 (2006).[10] Minnesota's political apparel ban covers an inordinate amount of speech, from Tea Party apparel to apparel with logos featuring the American Legion, NAACP, the National Rifle Association, and so on. App. D-18 n.7. Political apparel bans like the one here would have prevented voters from wearing any one of the tens of thousands of political artifacts featured in every presidential election since 1828. *See Picray*, 14 Or. App. at 601 n.12. Today, the same bans may reach common statements such as "God Bless America," "a shirt displaying the name of a religious school," or red and blue shirts, which may be construed to connote support for the Republican or Democratic Party. James J. Woodruff II, *Freedom of Speech & Election*

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[10] *See* Del. Code Ann. tit. 15, § 4942; Kan. Stat. Ann. § 25-2430(a); Mont. Code Ann. § 13-35-211(1); N.J. Stat. Ann. § 19:34-19; N.Y. Elec. Law § 8-104(1); S.C. Code Ann. § 7-25-180(B); Tenn. Code Ann. § 2-7-111(b)(1); Tex. Elec. Code Ann. § 61.010(a); Vt. Stat. Ann. tit. 17, § 2508(a).

Day at the Polls: Thou Doth Protest Too Much, 65 Mercer L. Rev. 331, 346 nn.120-122 (2014). In 2012, election workers in Colorado and Florida flagged down Massachusetts Institute of Technology students for wearing "MIT" shirts, because the workers had mistakenly thought the shirts evinced support for political candidate Mitt Romney. *See MIT Voters Flagged at Polls for Suspected Electioneering, Explain They're Not Shilling for Mitt Romney*, Huffington Post, Nov. 6, 2012.[11] In any event, the primary danger presented by an overbroad statute is not the potentially selective enforcement, but the overriding chilling effect that inhibits voters from exercising their First Amendment rights of expression. *Clean-Up '84 v. Heinrich*, 759 F.2d 1511, 1514 (11th Cir. 1985).[12]

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[11] http://www.huffingtonpost.com/2012/11/06/mit-voters-flagged-at-polls-for-suspected-electioneeringexplain-not-shilling-for-romney_n_2084332.html.

[12] The Eighth Circuit's disposition of Petitioners' as-applied challenge only highlights the problem with the statute's facial overbreadth. After all, when a statute sweeps more broadly than is warranted by the evil at which it aims, "a concern arises that the legislature . . . has created an excessively capacious cloak of administrative or prosecutorial discretion, under which discriminatory enforcement may be hidden." Richard H. Fallon, *Making Sense of Overbreadth*, 100 Yale L.J. 853, 884 (1991); *see also Heffron v. Int'l Soc'y for Krishna Consciousness Inc.*, 452 U.S. 640, 649 (1981) (discussing how some rules that are open for arbitrary application and inherently inconsistent with a valid time, place, and manner regulation are unconstitutional because such discretion has the potential for becoming a means of suppressing a particular point of view). If Minnesota officials decided to enforce the political apparel ban against voters who wore Tea Party shirts, but not against voters who wore AFL-CIO shirts, their actions would surely have violated the First Amendment's prohibition on viewpoint discrimination. *See Reed*, 2010 WL 4394289, at *1 ("[T]here is no viewpoint neutral

This case presents an excellent vehicle for this Court to resolve the conflict between a state's creation of a speech-free zone and a voter's right to free speech. To aid this Court in its deliberations, Minnesota's written Election Day Policy defines "political speech," and the State's concessions provide the Court with concrete evidence of the statute's overbreadth. Respondents vigorously defended the Minnesota statute through multiple stages of litigation and have candidly confirmed the statute's expansive scope by acknowledging that the statute applies not just to the Tea Party, Election Integrity Watch, and MoveOn.Org, but also to the Chamber of Commerce and AFL-CIO. Oral Arg. at 19:48 (No. 11-2125). And although Judge Shepherd's separate opinion in 2013 notified Respondents that Minnesota's political apparel ban could apply to all sorts of groups (American Legion, NAACP, and so on), the State conceded at a recent oral argument that its policy remains unchanged. Oral Arg. at 23:16, *Minnesota Majority v. Mansky*, 849 F.3d 749 (8th Cir. 2017) (No. 15-1682).[13]

Finally, the procedural posture of this case is ideal for this Court's review. Petitioners' first petition for certiorari to this Court was filed in 2013, when their as-applied claim was still pending before the district court. Although litigants are permitted to raise both as-applied and overbreadth challenges in First Amendment cases, "the lawfulness of the particular

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principle to distinguish between 'tea party' apparel and AFL-CIO apparel."). Now that the lower courts have rejected any suggestion of selective enforcement, *see* App. A-6–A-7, this Court should invalidate the ban as substantiall, overbroad under the First Amendment.

[13] http://media-oa.ca8.uscourts.gov/OAaudio/2016/10/151682.mp3.

application of the law should ordinarily be decided first." *Bd. of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 485 (1989). Perhaps for that reason, Respondents previously opposed certiorari on the basis that "review of Petitioners' facial challenge [was] not appropriate because Petitioners' as-applied challenge [was] still pending." Opposition to Petition for Writ of Certiorari at 1, 9, *Minnesota Majority v. Mansky*, 134 S. Ct. 824 (2013) (No. 13-185). The Eighth Circuit has now resolved Petitioners' as-applied challenge and the interlocutory posture no longer presents a barrier to this Court's review. *See Mount Soledad Mem'l Ass'n v. Trunk*, 132 S. Ct. 2535, 2536 (2012) (Alito, J., concurring in the denial of certiorari).

CONCLUSION

This Court should grant the Petition.

DATED: May 2017.

Respectfully submitted,

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United States Court of Appeals
For the Eighth Circuit

No. 15-1682

Minnesota Majority

Plaintiff

Minnesota Voters Alliance; Minnesota Northstar Tea Party Patriots; Election Integrity Watch; Susan Jeffers, individually and as an election judge; Dan McGrath; Andy Cilek

Plaintiffs - Appellants

v.

Joe Mansky, in his official capacity as the Elections Manager for Ramsey County; Virginia Gelms, in her individual and official capacity as the Elections Manager for Hennepin County; Mike Freeman, in his official capacity as Hennepin County Attorney; John Choi, in his official capacity as Ramsey County Attorney; Steve Simon, in his official capacity as Secretary of State

Defendants - Appellees

No. 15-1741

Minnesota Majority

Plaintiff

Minnesota Voters Alliance; Minnesota Northstar Tea Party Patriots; Election Integrity Watch;

Susan Jeffers, individually and as an election judge; Dan McGrath; Andy Cilek

Plaintiffs - Appellees

v.

Joe Mansky, in his official capacity as the Elections Manager for Ramsey County; Virginia Gelms, in her individual and official capacity as the Elections Manager for Hennepin County; Mike Freeman, in his official capacity as Hennepin County Attorney; John Choi, in his official capacity as Ramsey County Attorney

Defendants

Steve Simon, in his official capacity as Secretary of State

Defendant - Appellant

Appeals from United States District Court for the District of Minnesota - Minneapolis

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Submitted: October 20, 2016
Filed: February 28, 2017

Before RILEY, Chief Judge, LOKEN and BENTON, Circuit Judges.

BENTON, Circuit Judge.

Several organizations and individuals sued the Minnesota Secretary of State and Ramsey and Hennepin county election officials, attacking a statute prohibiting the wearing of political insignia at a

polling place. This court previously reversed dismissal of these groups' as-applied First Amendment claim. *Minnesota Majority v. Mansky*, 708 F.3d 1051, 1059 (8th Cir. 2013). On remand, the district court granted summary judgment for the defendants. Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

Minnesota Statute § 211B.11 prohibits wearing a "political badge, political button, or other political insignia . . . at or about the polling place on primary or election day." To help determine which materials were political, Minnesota election officials distributed an Election Day Policy with examples including: "Issue oriented material designed to influence or impact voting" and "Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)." Election judges were instructed to ask anyone wearing an item violating the Policy to remove or cover it. If a person refused, the election official should allow the person to vote, but record the person's name and address for potential misdemeanor prosecution.

Minnesota Majority, Minnesota Voters Alliance, Minnesota Northstar Tea Party Patriots, and their association—Election Integrity Watch ("EIW")—sued the Secretary of State and county election officials ("Minnesota") to enjoin enforcement of the statute and declare it unconstitutional. EIW alleged it was invalid—both facially and as-applied—under the First Amendment and violated their Equal Protection rights due to selective enforcement. Individuals associated with EIW claimed their speech

was chilled because they could not wear Tea Party logos and slogans at their polling places without fear of legal action.

The district court initially dismissed all claims. This court affirmed as to the Equal Protection and facial First Amendment claims, but reversed and remanded the as-applied First Amendment claim. *Minnesota Majority*, 708 F.3d at 1059. After "giv[ing] the parties sufficient opportunity to create an acceptable record," the district court granted summary judgment against EIW on the as-applied First Amendment claim.

II.

This court reviews de novo the grant of summary judgment. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc). Summary judgment is proper "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* Facts "must be viewed in the light most favorable to the nonmoving party," but "[t]he nonmovant 'must do more than simply show that there is some metaphysical doubt as to the material facts,' and must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.*, quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). There is no genuine issue if "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita*, 475 U.S. at 587.

A polling place is a nonpublic forum. *Minnesota Majority*, 708 F.3d at 1057. Restrictions on speech in a nonpublic forum are constitutionally valid if viewpoint neutral and "reasonable in light of the purpose which the forum at issue serves." *Id.* at 1057 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 49 (1983)). A state "has a legitimate interest in 'maintain[ing] peace, order and decorum' in the polling place" and "a compelling interest in 'protecting voters from confusion and undue influence' and 'preserving the integrity of its election process.'" *Id.*,(*first* quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *then* quoting *Burson v. Freeman*, 504 U.S. 191, 199 (1992)).

Here, the statute and Policy are viewpoint neutral and facially reasonable. *Id.* On remand, EIW needed to come forward with specific facts showing that banning Tea Party apparel in particular was not reasonable in light of the statute's purpose. *See id.* at 1057-59.

EIW argues the statute as applied to Tea Party apparel is not reasonable because the Tea Party is not a political party in Minnesota, does not endorse candidates or ballot issues, and its materials do not relate to anything on the ballot. EIW asserts that the apparel conveys only a philosophy, not an endorsement of particular candidates, ballot measures, or political parties.

EIW's argument fails to address that the statute and Policy prohibit more than election-related apparel. The statute and Policy prohibit "political"

apparel, defined as: "Material promoting a group with recognizable political views."

Even if Tea Party apparel is not election-related, it is not unreasonable to prohibit it in a polling place. In order to ensure a neutral, influence-free polling place, all political material is banned. To demonstrate that the Tea Party is political, Minnesota provided polling data and media coverage supporting the public perception that the Tea Party is political. It also noted that as of July 2010, the Tea Party was a recognized caucus in the U.S. House of Representatives. EIW offers nothing to rebut this evidence that the Tea Party has recognizable political views. A nonmoving party "must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Torgerson*, 643 F.3d at 1042 (quoting *Matsushita*, 475 U.S. at 586-87). EIW has failed to demonstrate a genuine issue of material fact whether Tea Party apparel is political. Banning apparel with its name and logo is "reasonable because it is wholly consistent with the [state]'s legitimate interest in preserving" polling place decorum and neutrality. *See Perry*, 460 U.S. at 50.

EIW also argues that individuals in Tea Party apparel were victims of selective enforcement (concluding this indicates that the "protectable interest is not so 'compelling'"). As evidence of selective enforcement, some wearing Tea Party apparel stated that they were asked to remove or cover it—causing voting delays and some of their names and addresses to be recorded. However, others wearing "political" apparel—Sierra Club and Target logos and all red or blue—voted without incident.

(EIW agrees that individuals in Tea Party apparel were not denied access to the polling place, and some voted without being asked to remove or cover their Tea Party apparel.)

This argument fails. EIW offers only speculation that voters in other political apparel escaped enforcement of the statute. EIW's repeated assertions that there is "no evidence" of enforcement against non-Tea-Party political apparel and that "it is believed" the statute was not enforced except against Tea Party apparel is not "com[ing] forward with specific facts." *See Torgerson*, 643 F.3d at 1042. EIW's evidence shows no more than "metaphysical doubt," which is not a genuine issue of material fact. *See id.*

Based on the evidence, no reasonable trier of fact could conclude that the statute and Policy as applied to EIW violated its First Amendment rights. The district court properly granted summary judgment.[1]

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The judgment is affirmed.

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[1] Given this disposition of appeal 15-1682, it is not necessary to address the Secretary of State's cross-appeal 15-1741, which is dismissed as moot. However, the district court's ruling on the Secretary's jurisdictional arguments should not be followed, as it characterizes this court's silence as implicit rejection of those arguments. *Minnesota Majority v. Mansky*, 62 F. Supp. 3d 870, 874-75 (D. Minn. 2014).

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Majority, et al.,

Plaintiffs,

v. No. 10-cv-4401 (JNE/SER)
ORDER

Joe Mansky, in his official capacity as the Elections Manager for Ramsey County, et al.,

Defendants.

This case is before the Court on motions for summary judgment brought by the three sets of Defendants: Hennepin County Elections Manager Virginia Gelms and Hennepin County Attorney Mike Freeman, collectively referred to as the Hennepin County Defendants; Ramsey County Elections Manager Joe Mansky and Ramsey County Attorney John Choi, collectively referred to as the Ramsey County Defendants; and Minnesota Secretary of State Steve Simon.[1] For the reasons discussed below, all three motions are granted.

Background

As the Court has previously described, *see Minnesota Majority v. Mansky*, --- F.Supp.3d - ---, 2014 WL 5243503, *1-2 (D. Minn. Oct. 15, 2014), the Plaintiffs brought this action just prior to the 2010

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[1] Current Minnesota Secretary of State Steve Simon and current Ramsey County Attorney John Choi are substituted as defendants for their predecessors. See Fed. R. Civ. P. 25(d).

general election in an effort to ensure that the Defendants would not bar them from wearing their "Please I.D. Me" buttons and Tea Party apparel to the polls. That effort implicated Minn. Stat. § 211B.11, subd. 1, a provision of Minnesota state election law which provides in relevant part that

> [a] person may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100 feet of the building in which a polling place is situated, or anywhere on the public property on which a polling place is situated, on primary or election day to vote for or refrain from voting for a candidate or ballot question. A person may not provide political badges, political buttons, or other political insignia to be worn at or about the polling place on the day of a primary or election. A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day. . . .

Violation of this statute is a petty misdemeanor, Minn. Stat. § 211B.11, subd. 4, that may be prosecuted by a county attorney, *id.* § 211B.16.

On the eve of the election, the Court denied the Plaintiffs' motion for a temporary restraining order and preliminary injunction. The same day, the Defendants circulated a memorandum, referred to in

this litigation as the Election Day Policy, which reads as follows:

> Please use the following process when dealing with an individual who is displaying political or campaign material in the polling place.
>
> 1. Minnesota law prohibits persons from wearing "political badges, political buttons, or other political insignia" or displaying campaign material within the polling place.
>
> 2. Election judges have the authority to decide what is "political." Examples include, but are not limited to:
>
> - Any item including the name of a political party in Minnesota, such as the Republican, DFL, Independence, Green or Libertarian parties.
>
> - Any item including the name of a candidate at any election.
>
> - Any item in support of or opposition to a ballot question at any election.
>
> - Issue oriented material designed to influence or impact voting (including specifically the "Please I.D. Me" buttons).

- Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)

3. If a person is wearing political material, you should do the following:

- Explain that state election law prohibits displaying political materials in the polling place. (Minnesota Statutes 211B.11, subdivision 1.)

- Ask the individual to either cover up or remove the political material while in the polling place.

- If they refuse, explain that eligible voters will be allowed to vote, but any refusal will be recorded and referred to appropriate authorities.

4. Even if a voter refuses to do so, you must permit any eligible voter to receive a ballot and vote.

5. Record the name and address of a voter from the polling place roster in the incident log, along with a brief description of the item (button, hat, t-shirt, etc.) that the voter refused to remove or cover up.

6. Election judges and official challengers are prohibited from displaying political or campaign material

> in the polling place. If they refuse to remove the political or campaign material, you can ask them to leave.

The implementation of this policy at the polls on election day affected several of the Plaintiffs:

> One was asked to cover or remove his [Tea Party] t-shirt. Another who refused to cover or remove his ["Please I.D. Me"] button had his name and address recorded. Yet another who was wearing both a t-shirt and a button was delayed several hours before voting. [The Plaintiffs] assert[] that the fear of prosecution stopped others from displaying the apparel. Still others who were wearing materials from [the Plaintiff organizations] and other similar organizations voted without incident.

Minnesota Majority v. Mansky, 708 F.3d 1051, 1055 (8th Cir. 2013).

After the election, the Plaintiffs filed an Amended Complaint, which is the operative one here. The Plaintiffs asserted three claims under 42 U.S.C. § 1983: at Count I, for a violation of their First Amendment rights; at Count II, for a violation of their right to Due Process under the Fourteenth Amendment; and at Count III, for a violation of their right to Equal Protection under the Fourteenth Amendment. The Plaintiffs also asserted in Count IV that Minn. Stat. § 211B.11, subd. 1 is unconstitutional under the First Amendment.

The Court subsequently granted the Defendants' motion to dismiss the Amended Complaint in its entirety. The Plaintiffs appealed the dismissal of their First Amendment and Equal Protection claims. In 2013, the Eighth Circuit Court of Appeals affirmed the dismissal of the Plaintiffs' Equal Protection claim and their First Amendment facial challenge, but reversed and remanded their First Amendment as-applied challenge for consideration under the standards of Federal Rule of Civil Procedure 56. *Minnesota Majority*, 708 F.3d at 1054.

In these remand proceedings, the Minnesota Secretary of State previously filed a motion to dismiss or for summary judgment. In October of 2014, the Court granted him summary judgment on the portion of the Plaintiff's First Amendment as-applied claim that relates to the "Please I.D. Me" buttons, but denied his motion as it pertained to the portion of the claim relating to Tea Party apparel. *Minnesota Majority*, --- F.Supp.3d ----, 2014 WL 5243503, *5-8.

Discussion

The Ramsey County Defendants, Hennepin County Defendants, and the Secretary of State have now each moved for summary judgment on what remains of the Plaintiffs' First- Amendment as-applied claim. As explained below, all three of these motions are granted.

I. Dismissal of the Ramsey County Defendants

As a threshold matter, the Ramsey County Defendants argue in their motion that they should be dismissed from the case at this time because the only Plaintiff who claimed to have been affected by the prohibition on wearing "Please I.D. Me" buttons and Tea Party apparel at a polling place in Ramsey County – Jeff Davis – withdrew as a party in September of 2014. *See* Stipulated Agreement Dismissing the Plaintiffs Jeff Davis and Dorothy Fleming, ECF No. 125. The Amended Complaint alleged that Davis, a Ramsey County voter, chose not to wear his "Please I.D. Me" button and Tea Party t-shirt to the polls in 2010 out of fear of prosecution by Ramsey County officials. Amended Complaint ¶¶ 76-82, ECF No. 42.

In their briefing, the Plaintiffs failed to respond at all to the Ramsey County Defendants' argument. When the Court prompted the Plaintiffs to state their position on the matter at oral argument, they indicated only that they believe their case against the Ramsey County Defendants to survive Davis' withdrawal because one of the Plaintiffs who remains a party, Susan Jeffers, is an election judge in Ramsey County.

The Plaintiffs' bare reference to Jeffers, particularly in light of their failure to brief the issue, is an insufficient response to the Ramsey County Defendants' argument. The only claim that survived to these remand proceedings is the Plaintiffs' First Amendment as-applied challenge to Minn. Stat. § 211B.11, subd. 1 and the Election Day Policy. The

injury the Plaintiffs claim to have suffered is the violation of their asserted constitutional right to wear their "Please I.D. Me" buttons and Tea Party apparel to the polls. Jeffers' presence in the case as a plaintiff does not work to tie any such injury to the conduct of the Ramsey County Defendants.

According to the Amended Complaint, "Jeffers is an eligible and registered voter in Minnesota, residing [in] New Brighton" and "an election judge in Ramsey County, Minnesota." *Id.* ¶ 12. Beyond that, though, the Amended Complaint alleges only: that Jeffers contacted Ramsey County Elections Manager Joe Mansky prior to the 2010 general election "regarding certain rumors relating to Election Integrity Watch 'Please I.D. Me.' Buttons and North Star Patriots shirts"; that Mansky informed Jeffers that those buttons and shirts would be prohibited at Ramsey County polling places; and that Jeffers was "shocked" and "disagrees with" that position. *Id.* ¶¶ 50-56. There is no allegation that Jeffers has ever attempted in the past, or intends in the future, to wear a "Please I.D. Me" button or Tea Party apparel to the polls in Ramsey County, nor that has she in any manner been deterred from doing so by the Ramsey County Defendants.

The Ramsey County Defendants are therefore dismissed from this case. Furthermore, even if the Ramsey County Defendants were not entitled to dismissal on these grounds, they have joined the arguments of the Hennepin County Defendants and the Secretary of State that are discussed in Sections II and III below, and the Court would grant their motion for summary judgment on those bases.

II. "Please I.D. Me" buttons and the Hennepin County Defendants

A second preliminary issue arises from the Court's October 2014 decision granting the Secretary of State's motion for summary judgment with respect to the Plaintiffs' First Amendment challenge to the application of Minn. Stat. § 211B.11, subd. 1 and the Election Day Policy to their "Please I.D. Me" buttons. While the Hennepin County Defendants did not join the Secretary's motion at the time, they now argue that the record and reasoning on which the Court's decision rests apply equally to them, such that they too are entitled to summary judgment on that aspect of the Plaintiffs' as-applied claim.

The Court agrees. And, it should be noted, the Plaintiffs conceded this point. The Plaintiffs did not oppose this aspect of the Hennepin County Defendants' motion. And, in fact, the Plaintiffs stated at oral argument that they are no longer pursuing their claim as it pertains to their "Please I.D. Me" buttons.

Summary judgment is therefore granted to the Hennepin County Defendants on the portion of the Plaintiffs' First Amendment as-applied claim that relates to the "Please I.D. Me" buttons.

III. Tea Party apparel

Consequently, the only claim that remains is the Plaintiffs' First Amendment challenge to the Secretary of State and Hennepin County Defendants' application of Minn. Stat. § 211B.11, subd. 1 and the

Election Day Policy to their Tea Party apparel. The Defendants have moved for summary judgment on this as-applied claim, arguing that prohibiting the Plaintiffs from wearing Tea Party apparel at the polling place does not violate their First Amendment rights.

In its decision on the Plaintiffs' appeal, the Eighth Circuit explained that "[u]nder the First Amendment, the statute and Policy are constitutional as applied to [the Plaintiffs] if their application to [them] is viewpoint neutral and 'reasonable in light of the purpose which the forum at issue serves.'" *Minnesota Majority*, 708 F.3d at 1059 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)).

Summary judgment may only be granted to the Defendants if they can show both "that there is no genuine dispute" as to any material fact and that they are "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Defendants must support the assertion that there is no genuine dispute of material fact either "by citing to particular parts of materials in the record" or by showing that the Plaintiffs "cannot produce admissible evidence to" create a genuine dispute. Fed. R. Civ. P. 56(c)(1). This record evidence "and all fair inferences from it" are viewed "in the light most favorable to" the Plaintiffs. *Johnson v. Blaukat*, 453 F.3d 1108, 1112 (8th Cir. 2006).

As explained below, on the record before the Court, the Defendants have carried their burden and are entitled to summary judgment.

A. Viewpoint neutral

The first prong of the First Amendment as-applied analysis is whether the Defendants' application of Minn. Stat. § 211B.11, subd. 1 and the Election Day Policy to the Plaintiffs' Tea Party apparel is "viewpoint neutral." *Minnesota Majority*, 708 F.3d at 1059.

It is. The third sentence of Minn. Stat. § 211B.11, subd. 1 prohibits the wearing of "[a] political badge, political button, or other political insignia . . . at or about the polling place on the day of a primary or election." The Eighth Circuit determined that that provision of the statute "is viewpoint neutral" because it "applies to all political material, regardless of viewpoint" and "does not define 'political' to include or exclude any view." *Id.* at 1057, 1059.

In fact, the statute does not define "political" at all. In the absence of a statutory definition, the Election Day Policy provides guidance to the election judges who staff the polling places and are tasked with determining what constitutes prohibited "political" material. Giving content to that term, the policy the Defendants drafted

> recites as examples of "political": "the name of political party [sic] in Minnesota, such as the Republican, DFL, Independence, Green or Libertarian parties"; items "in support of or opposition to" any ballot question; "[i]ssue oriented material designed to influence or impact voting (including

> specifically the 'Please I.D. Me' buttons"); and "[m]aterial promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)."

Id. at 1059. The Eighth Circuit determined that the Election Day Policy is viewpoint neutral because these parameters for identifying "political" material at the polls – within which the Plaintiffs' "Please I.D. Me" buttons and Tea Party apparel explicitly fall – "do not exclude any party, material, or group from the Policy's application and do not favor or disfavor any view." *Id.* at 1059.

The statute and Election Day Policy are therefore not viewpoint-discriminatory restrictions. Under the Election Day Policy, the Plaintiffs' Tea Party apparel comes within the scope of the statutory prohibition on "political" material in the polling place because it is clothing that "promot[es] a group with recognizable political views," not because of the particular set of political views that that group holds. In the same way, the policy bars the Plaintiffs' "Please I.D. Me" buttons from the polls because they are "[i]ssue oriented material[s] designed to influence or impact voting," not because they reflect or are associated with a particular stance on an issue.

The Plaintiffs do not contest that the application of the statute and Election Day Policy to them is, in this sense, viewpoint neutral. On these motions, however, they do argue that, in a different sense, the statute and Election Day Policy have been applied to them in a viewpoint-discriminatory manner – namely, that the statute and policy have been

"selectively enforced" against individuals wearing Tea Party apparel at the polls. In support of this contention, the Plaintiffs indicate, by way of affidavit, the following:

- Plaintiff Andy Cilek attests that he was prevented from wearing his Tea Party Patriots t-shirt in the polling place during the November 2010 general election. Cilek, however, states that he observed other voters at the polls wearing "red Target shirts with a Target bulls-eye symbol," other "corporate logos," "all red or all blue apparel," and "apparel of . . . organization[s] that . . . endorse candidates such as the Sierra Club," who were not made to cover or remove that apparel.

- Cilek also avers that he has "found no evidence" that individuals who wore the apparel of organizations that endorse candidates – such as the Sierra Club, its Minnesota North Star Chapter, the Minnesota AFL-CIO, and Minnesota Education – to the polls have been "targeted for possible prosecution."

- Plaintiff Dan McGrath likewise states that he has "found no evidence" that individuals

> wearing the apparel of "organizations that endorse candidates" such as the National Rifle Association and Take Action MN to the polls have been "targeted for possible prosecution."

However, even accepting these assertions as facts and assuming that they would be sufficient to establish that the Plaintiffs have been the subjects of viewpoint-discriminatory enforcement of Minn. Stat. § 211B.11, subd. 1 and the Election Day Policy,[2] the Plaintiffs have nonetheless failed to demonstrate that there is a genuine issue of material fact regarding the Defendants' liability.

The Plaintiffs pled and argued the same charge of viewpoint-discriminatory enforcement against the Defendants earlier in this litigation in support of their since-dismissed Equal Protection claim. See Amended Complaint ¶¶ 117-19, ECF No. 42 (alleging in support of Equal Protection claim that "[t]he Defendants admit that they adopted a policy that prohibited the wearing of Election Integrity Watch 'Please I.D. Me'

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[2] The Plaintiffs claim not only that other voters have not been prohibited from wearing clothing associated with organizations of a similar ilk to the polls, but also that Minn. Stat. § 211B.11, subd. 1 and the Election Day Policy have been enforced inconsistently against them. *See, e.g.*, Amended Complaint ¶¶ 67, 73, ECF No. 143 ("On November 2, 2010 within Hennepin County, in places serving as a polling place, some election judges allowed individuals to wear the message of the Election Integrity Watch – 'Please I.D. Me.' No election judge stopped or questioned the wearing of the button in those polling places.")

buttons and Tea Party Patriots clothing at the polling place and did not enforce or otherwise apply a similar policy to other groups" and that "the standardless discretion" the statute and Election Day Policy give to election judges "resulted in inconsistent enforcement"). On the Plaintiffs' appeal, the Eighth Circuit determined that these allegations fail to state a claim against the Defendants:

> [The Plaintiffs] argue[] that election judges selectively enforced the statute and the Policy. Even if the complaint adequately described how the statute and Policy were enforced differently among similarly situated people (including among people who wore the "Please I.D. Me" buttons), the complaint must also allege that [the Defendants] caused the selective enforcement. *Madewell v. Roberts*, 909 F.2d 1203, 1208 (8th Cir. 1990) ("Liability under § 1983 requires a causal link to, and direct responsibility for, the deprivation of rights."). While causation is generally a question of fact, this court may decide the question as a matter of law where "the question is so free from doubt as to justify taking it from the [fact finder]." *Parrish v. Ball*, 594 F.3d 993, 1000 (8th Cir.2010) (alteration in original), *quoting Ricketts v. City of Columbia*, 36 F.3d 775, 779–80 (8th Cir.1994).
>
> Because the statute and Policy do not "affirmatively sanction" selective

enforcement, this court analyzes the claim against the municipalities and the official-capacity defendants under the "deliberate indifference" standard of *City of Canton v. Harris*, 489 U.S. 378, 388, 109 S. Ct. 1197, 103 L.Ed.2d 412 (1989). *Szabla v. City of Brooklyn Park, Minn.*, 486 F.3d 385, 390 (8th Cir. 2007) (en banc) ("Where a policy is constitutional on its face, but it is asserted that a municipality should have done more to prevent constitutional violations by its employees, a plaintiff must establish the existence of a 'policy' by demonstrating that the inadequacies were a product of deliberate or conscious choice by policymakers. The standard of fault in that situation is 'deliberate indifference' to constitutional rights." (internal citation omitted)). The complaint alleges only that the Policy's "standardless discretion" resulted in selective enforcement. The Policy's delegation of discretion to election judges did not, without more, cause selective enforcement. *See Dick v. Watonwan Cnty.*, 738 F.2d 939, 942–43 (8th Cir. 1984) (holding that a municipality's policy giving discretion to subordinates did not subject the municipality to liability for the subordinates' errors of judgment).

This court has not reviewed a suit against an individual-capacity defendant

> who wrote a policy so standardless that it caused selective enforcement. The closest analogy is suing an individual-capacity defendant for failure to train subordinates, causing selective enforcement. A supervisor may be individually liable for failure to train subordinates if it amounts to deliberate indifference to the rights of persons whom the subordinates harm. *Parrish*, 594 F.3d at 1002; *Andrews v. Fowler*, 98 F.3d 1069, 1078 (8th Cir. 1996) (applying the same standard from official-capacity failure to train to the individual-capacity allegation). The same "deliberate indifference" standard applies in this case. The election supervisors' Policy that delegated discretion to election judges did not, without more, cause selective enforcement. *See Dick*, 738 F.2d at 942 ("The Board might have chosen to adopt more detailed guidelines, and such rules might have averted the mistake that was made in this case, but the Board's decision to rely on its employees' judgment is certainly not unconstitutional in and of itself....").
>
> [The Plaintiffs] ha[ve] failed to allege that [the Defendants] caused selective enforcement of the facially neutral statute and Policy, and has therefore failed to state an equal protection claim.

Minnesota Majority, 708 F.3d at 1060.

In the face of this adverse decision, the Plaintiffs attempt to revive their charge of selective enforcement here by arguing that it is equally cognizable on an as-applied challenge under the First Amendment as on one brought under the Equal Protection Clause. *See McGuire v. Reilly*, 386 F.3d 45, 61 (1st Cir. 2004) (distinguishing two separate "types of as-applied attacks" under the First Amendment: the first involving the "testing" of a broadly-worded and widely-applicable statute "in one particular fact situation while refusing to adjudicate the constitutionality of the law in other fact situations," and the second "based on the idea that the law itself is neutral and constitutional in all fact situations, but that it has been enforced selectively in a viewpoint discriminatory way"). *But see Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998) (explaining that a claim "that discriminatory enforcement of a speech restriction amounts to viewpoint discrimination in violation of the First Amendment" is distinct from an as-applied First Amendment challenge, which "contends that the law is unconstitutional as applied to the litigant's particular speech activity [and] does not implicate the enforcement of the law against third parties"). The Plaintiffs' implication, apparently, is that even if the Eighth Circuit has already rejected their selective enforcement allegations under the rubric of an Equal Protection claim, they nonetheless remain viable here in the guise of their surviving First Amendment as-applied challenge.

This is not correct. As the Eighth Circuit's decision reflects, the Amended Complaint alleges –

and the record now bears out – that the Defendants drafted and disseminated the Election Day Policy. But, it was election judges – who are not parties to this case – who were tasked with enforcing Minn. Stat. § 211B.11, subd. 1 and implementing that policy at the polling places. Even assuming for the purposes of this motion that the election judges did engage in viewpoint-discriminatory enforcement of the facially-neutral statute and Election Day Policy as the Plaintiffs contend, the Eighth Circuit determined that the Defendants may be held liable here under § 1983 only if they were "deliberately indifferent" to that violation of the Plaintiffs' constitutional rights. It makes no difference to that analysis whether selective enforcement by the election judges constitutes a violation of the Plaintiffs' constitutional rights under the First Amendment or the Equal Protection Clause. Either way, the Eighth Circuit concluded that the discretion granted to the election judges in the Election Day Policy does not supply the requisite causal link between the Defendants and the constitutional violations allegedly committed by the election judges.

And the Plaintiffs have offered nothing more here. There is no hint anywhere in the Plaintiffs' pleadings, arguments, or evidence of any causal link between the selective enforcement allegedly committed by the election judges and the Defendants.[3]

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[3] The Plaintiffs, citing what they characterize as a "paucity of facts regarding the application of the [sic] Minnesota Statute § 211B.11 and the accompanying so-called Election Day policy," state in their brief that they "shall . . . move under Rule 56(d) to request the disposition [sic] of this Court's decision on the Defendants' motions be delayed to allow time for discovery."

The Plaintiffs accuse the Defendants of doing no more than drafting and distributing a viewpoint-neutral policy whose terms were to be implemented at the polls by election judges.[4] The Eighth Circuit has already held that that does not give rise to the Defendants' liability.

In sum, then, there is no genuine dispute to be had on this record regarding whether the Defendants applied the statute and Election Day Policy to the

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However, the Plaintiffs did not actually make such a motion, nor have they submitted an affidavit or declaration attesting to the discovery that would be needed to respond to the Defendants' motions, as required by the rule. *See Ray v. Am. Airlines, Inc.*, 609 F.3d 917, 923 (8th Cir. 2010) ("To obtain a Rule 56([d]) continuance, the party opposing summary judgment must file an affidavit "affirmatively demonstrating . . . how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact.") (*quoting Humphreys v. Roche Biomedical Lab., Inc.*, 990 F.2d 1078, 1081 (8th Cir. 1993)).

Furthermore, the Plaintiffs have failed throughout these proceedings to articulate any basis at all on which to even suspect that there may be any link between the Defendants and the selective enforcement that they contend was committed by the election judges at the polls. *See Duffy v. Wolle*, 123 F.3d 1026, 1041 (8th Cir. 1997), *abrogated on other grounds by Torgerson v. City of Rochester*, 643 F.3d 1031 (8th Cir. 2011) ("[I]t is well settled that Rule 56([d]) does not condone a fishing expedition where a plaintiff merely hopes to uncover some possible evidence of a constitutional violation.") (quotation omitted).

[4] It bears noting that the Plaintiffs do not claim to have been prosecuted under Minn. Stat. § 211B.11. In fact, the Plaintiffs do not allege that any county attorney, including the Defendant Hennepin County Attorney and Ramsey County Attorney, has ever prosecuted anyone under Minn. Stat. § 211B.11.

Plaintiffs' Tea Party apparel in a viewpoint-neutral manner. They did.

B. Reasonable

On the second prong of the First Amendment as-applied analysis, "the statute and the Election Day Policy are constitutional as applied to [the Plaintiffs] if their application to [them] is . . . reasonable in light of the purpose which the forum at issue serves." *Minnesota Majority*, 708 F.3d at 1059 (quotation omitted).

The forum at issue, of course, is the polling place, the purpose of which is to facilitate "each voter's [private] communication of his own elective choice," *Marlin v. District of Columbia Bd. of Elections and Ethics*, 236 F.3d 716, 719 (D.C. Cir. 2001), and to protect the citizen in that effort from the "two evils" of "voter intimidation and election fraud." *Burson v. Freeman*, 504 U.S. 191, 206 (1992). Accordingly, the Eighth Circuit recognized that "[t]he state has a legitimate interest in maintain[ing] peace, order, and decorum in the polling place," as well as a "compelling interest in protecting voters from confusion and undue influence and preserving the integrity of its election process." *Minnesota Majority*, 708 F.3d at 1057 (quotations omitted).

Minnesota state law contains a number of provisions ostensibly in service of these ends. *See, e.g.*, Minn. Stat. § 204C.06 (ensuring that individuals are "allowed to go to and from the polling place for the purpose of voting without unlawful interference" and providing for a sergeant-at-arms "to keep the peace"

at the polling place); *id.* § 204C.10 (setting voter registration requirements); *id.* § 204C.13 (directing that the voter "retire alone to an unoccupied voting booth" to mark the ballot and requiring that the ballot be "fold[ed] to conceal the face and all marks on it" before being handed to the election judge for deposit in the ballot box).

Minn. Stat. § 211B.11, subd. 1 is another. And indeed, the evidence before the Court is that the Election Day Policy was written to guide the election judges tasked with enforcing that statute at the polls in "maximize[ing] voter participation and minimiz[ing], if not eliminate[ing] all, disruption of the polling place . . . ." Affidavit of Joseph Mansky at 2, ECF No. 153-1 at 24. The question here is whether the application of the statute to the Plaintiffs' Tea Party apparel – which the Defendants communicated to the election judges in the Election Day Policy – is a reasonable means of achieving those legitimate state interests. To pass constitutional muster, it must be one – rather than "the most" or "the only" – reasonable means of doing so. *Minnesota Majority*, 708 F.3d at 1058 (*quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Ind.*, 473 U.S. 788, 808 (1985)).

The starting point for answering that question is the text of Minn. Stat. § 211B.11, subd. 1, which contains two potentially relevant prohibitions. The first, in sentence one, states that "[a] person may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100 feet of the building in which a polling place is situated, or anywhere on the public property on which a polling place is situated, on

primary or election day to vote for or refrain from voting for a candidate or ballot question." As the Eighth Circuit noted in regard to the Plaintiffs' facial challenge, the Supreme Court in *Burson* found an analogous statutory prohibition on "campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question" within 100 feet of a polling place to be "necessary and narrowly tailored" to achieve the state's interests. 504 U.S. at 193, 206, 211. Nevertheless, in their as-applied challenge, the Plaintiffs argue here that this prohibition cannot reasonably be applied to their Tea Party apparel because the undisputed evidence demonstrates that the Tea Party is not a "political party" under Minnesota law, *see* Minn. Stat. § 200.02, subd. 6 (defining "political party" as "an association of individuals under whose name a candidate files for partisan office"), and it does not endorse candidates or take official positions on ballot questions.

Whatever the merits of that argument,[5] Minn. Stat. § 211B.11, subd. 1 contains a second relevant prohibition. In its third sentence, the statute also bans the wearing of "political badges, political buttons, or other political insignia at or about the polling place on the day of a primary or election." This prohibition is

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[5] The Plaintiffs' claim that the Tea Party does not take positions on ballot questions is not supported by the facts before the Court, particularly in light of the record evidence regarding Plaintiff Minnesota Northstar Tea Party Patriots' involvement in Election Integrity Watch's voter identification campaign. *See infra* note 6.

not limited, as sentence one is, to material designed to "induce or persuade a voter . . . from voting for a candidate or ballot question."

Instructive here, then, as the Eighth Circuit's analysis indicates, is that "[o]ther courts have applied *Burson* to uphold bans on material unrelated to any issue on the ballot." *Id.* at 1058. For instance, the Eleventh Circuit "conclude[d] that [a] Florida statute . . . banning Plaintiffs from engaging in exit solicitation about a non-ballot issue within 100 feet of polling places in Florida" is an appropriate "precaution[] to protect and facilitate voting." *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1222 (11th Cir. 2009). Similarly, the Fifth Circuit determined that a Louisiana statute prohibiting "all solicitation of signatures for a recall petition that is not on the ballot" within 600 feet of the polling place – including "all wearing of clothing or buttons bearing visible words or symbols supportive of such recall" – to be "the most defensible" way for the state to "protect[] its voters" from "politicking." *Schirmer v. Edwards*, 2 F.3d 117, 123-24 (5th Cir. 1993).

In light of these precedents, and on the record before the Court, there is no genuine question that the Defendants' application of the ban on "political badges, political buttons, or other political insignia" in Minn. Stat. § 211B.11, subd. 1's third sentence to the Plaintiffs' Tea Party apparel is reasonable. That apparel consists of t-shirts and hats bearing the words "Tea Party Patriots" and the group's shield. *See* Amended Complaint Ex. B, ECF No. 42-1. Some of the t-shirts also feature a slogan in conjunction with that

name and shield, including "Fiscal Responsibility, Limited Government, Free Markets," "Don't Tread on Me," "We'll Remember in November," and "Liberty." *Id.*

The Defendants have submitted a volume of evidence pertaining to the Tea Party, including the following:

- a printout from Plaintiff Election Integrity Watch's website attesting that its fellow Plaintiff "Northstar Tea Party Patriots is an alliance of tea party groups from across the state of Minnesota [whose] goal is to attract, educate, organize, and mobilize citizens to secure public policy consistent with our three core values of Fiscal Responsibility, Constitutionally Limited Government and Free Markets";

- a Pew Research Center report on "the nature and scope of political polarization in the American public" stating that "[s]upport for the Tea Party is concentrated about evenly within . . . two conservative typology groups: . . . Steadfast Conservatives and . . . Business Conservatives," while "groups with a Democratic leaning express more disagreement than agreement" with the Tea Party;

- a New York Times article stating that "[t]he Tea Party movement set the agenda [and] propel[ed] the Republican sweep" in the United States House of Representatives in the

November 2010 general election, while also "carr[ying] to victory" two Republican Senators;

- a printout from the website of the United States House of Representatives Committee on House Administration showing that the House Tea Party Caucus was approved in July of 2010 and was at that time chaired by Representative Michele Bachmann of Minnesota, as well as a list of members of that caucus as of December of 2010; and

- a local news article discussing tensions between "mainstream" Republicans and Tea Party "activists," while attributing to the Chairman of the Minnesota Republican Party the sentiment that "tea party energy and ideas make the GOP more vibrant than the Democratic Party."

The Plaintiffs have submitted evidence of their own regarding the Tea Party and their perspectives on the significance of wearing its apparel:

- Plaintiff Cilek states in his affidavits that, while he is "not a member of the [Plaintiff] Minnesota Tea Party Patriots," he did wear a t-shirt "with the large printed statement 'Don't tread on me'" and "the statement 'Tea Party Patriots' on it as well in small print" to the polls in 2010. Cilek indicates that he "liked the

apparel for the statement 'Don't tread on me'" and "saw that statement as symbolic of who I am as a person – independent as a thinker and doer – and that others should not take advantage of me or disrespect me," while "[t]he Tea Party Patriots small logo was of little consequence to me . . . ." Cilek did not consider his t-shirt to be an "endors[ement of] a particular candidate or ballot question if a question was on the ballot."

- Plaintiff McGrath states in his affidavit that Tea Party apparel "convey[s] a philosophy and do[es] not support candidates, political parties or ballot measures."

- Former Plaintiff Randy Liebo, an organizer for the Minnesota Northstar Tea Party Patriots and "an advocate of the Northstar Patriots effort," states in an affidavit that "Tea Party Patriots shirts or hats . . . reflect the values of the organization inclusive of subjects such as fiscal responsibility, constitutionally limited government and free markets." Liebo further states that the wearing of Tea Party apparel is an "expression[] of free speech or association with the group" and its "demand [for] governmental integrity, rather than an endorsement of "a specific candidate or ballot question."

- Former Plaintiff Jeff Davis states in his affidavit that, "[i]n preparation for the 2010 election," the Minnesota Northstar Tea Party Patriots and two other Plaintiff organizations "formed a coalition 'referred to as 'Election Integrity Watch,' a concerned grass roots effort to protect election integrity." Davis further states that Election Integrity Watch created the "Please I.D. Me" buttons, which were intended to be worn to the polls by "its separate organizational members and supporters," and also "developed a program for individuals . . . to act as poll watchers . . . ."[6]

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[6] Though Davis, and the Plaintiffs generally, contend that the "Please I.D. Me" buttons were not part of a "political campaign related to voter identification," the facts in the record are clearly to the contrary.

As the Court explained in its October 2014 order, Plaintiff Election Integrity Watch stated on its own website in the lead-up to the 2010 general election that Minnesota Voters Alliance – one of its three constituent organizations – was "currently working to pass voter photo ID [requirements] in both state and city government." Minnesota Majority, --- F.Supp.3d ---, ---, 2014 WL 5243503, *6 (quoting Kaardal Declaration Ex. A, ECF No. 8-6 at 10). Indeed, Minnesota Voters Alliance itself stated on its website that one of its "main goals" was to "[p]rotect the integrity of the vote through a photo I.D. requirement at the polls." Kaardal Declaration Ex. E, ECF No. 8-6 at 17.

Furthermore, the affidavit of Defendant Joseph Mansky – which the Plaintiffs submitted on these motions – recounts that a Republican-sponsored photo identification bill failed in the Minnesota legislature in 2009 on a party-line vote. Kaardal Declaration Ex. 10, ECF No. 153-1 at 25-26. Election Integrity Watch's "Action Plan" for its "Please I.D. Me" buttons specifically references that legislative effort. Kaardal Declaration Ex. B, ECF

Fundamentally, then, the Plaintiffs' opposition to the Defendants' motions is grounded in their contention that the Tea Party is not "political." The Plaintiffs strive to define the Tea Party as an apolitical "philosophical" organization or movement; their argument is that there can be no logical connection between a group of that nature and a statutory prohibition that is designed to preserve the decorum of the voting process and to protect voters from politicking at the polls on election day.[7]

No. 8-6 at 13 ("When you go to vote on November 2, wear your Election Integrity Watch button and show your photo ID when you sign-in to vote. While Minnesota does not require an individual to show an ID, let's act like it does. . . . (Although polls show that over 80% of Minnesotans support requiring a photo ID to vote, this measure has been repeatedly blocked by leaders in the Minnesota state legislature).").

Mansky also explains that the Republican candidates for governor and Secretary of State in 2010 identified the passage of photo identification requirements as among their priorities if elected. Kaardal Declaration Ex. 10, ECF No. 153-1 at 26-27. And, as the Court has noted, a proposed amendment to the Minnesota Constitution that would have required photo identification for voting appeared on the ballot in 2012, and was rejected. *Minnesota Majority*, --- F.Supp.3d ----, 2014 WL 5243503, *6 n.2. *See also* Office of the Minnesota Secretary of State, Results for Constitutional Amendments, http://electionresults.sos.state.mn.us/Results/AmendmentResultsStatewide/1.

[7] The Plaintiffs also attempt here to revive an argument that Minn. Stat. § 211B.11, subd. 1 and the Election Day Policy are unconstitutionally vague. But, like the Plaintiffs' selective enforcement allegations, this claim did not survive the Eighth Circuit's decision on the Plaintiffs' appeal.

In its 2011 order of dismissal, the Court rejected all of the Plaintiffs' vagueness claims as they pertain to both the statute and the Election Day Policy. *Minnesota Majority v. Mansky*, 789 F.Supp.2d 1112, 1124-29 (D. Minn. 2011). On appeal, the

The Plaintiffs' effort to deny the obviously political nature of the Tea Party, however, is as unconvincing now as it was when the Plaintiffs first made it at the outset of this case. In the 2011 order of dismissal, the Court addressed the issue as follows:

> Plaintiffs' argument that the buttons and T-shirts in question are not political is unavailing. . . .
>
> [T]he Tea Party apparel communicates support for the Tea Party movement which is associated with particular views on matters of public governance. The Amended Complaint describes the North Star Tea Party Patriots as "a coalition of local associations in Minnesota with a mission to attract, educate, organize, and mobilize citizens to secure public policies consistent with values inclusive of fiscal responsibility, constitutionally limited government and free markets." (Am. Compl. ¶ 9) The Amended Complaint acknowledges that the Tea Party apparel at issue "reflect[s] the[se] values." (Am

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Plaintiffs failed to preserve any challenge to the statute and policy based on vagueness. As the Eighth Circuit noted there, [The Plaintiffs] note[] that the statute does not define "political." [The Plaintiffs], however, do[] not include the word "vague" or "vagueness" in [their] argument to this court. [The Plaintiffs] ha[ve] waived [their] vagueness challenge by failing to brief it to this court. *United States v. Frook*, 616 F.3d 773, 777 n.2 (8th Cir. 2010).
Minnesota Majority, 708 F.3d at 1057 n.2.

Compl. ¶ 45) In July 2010 the U.S. House of Representatives recognized a Tea Party caucus consisting entirely of Republican members of Congress. Mobilizing public opinion on matters of fiscal or electoral policy, or on the proper reach of government, like persuading and organizing elected representation, is "political" activity by any fair estimation. Whether a group endorses candidates for public office is not the litmus test for whether it is a "political" organization. Such a pinched definition of politics would be inconsistent with the fundamental premise of American democracy: the power to govern, on any number of matters that come to be of general concern, belongs to the people. The vigorous debate about those matters is political, whether or not it finds expression in a registered political party as defined by the Minnesota Statutes. *See* Minn.Stat. § 200.02, subd. 6 (2010). The Court concludes that prohibiting apparel that expresses support for a political ideology is reasonably related to the legitimate state interest of "maintain [ing] peace, order, and decorum" at the polls. *Mills*, 384 U.S. at 218, 86 S. Ct. 1434; accord *Burson*, 504 U.S. at 211, 112 S. Ct. 1846 ("The Court ... has recognized that a State indisputably has a compelling interest in preserving the integrity of its election process." (quotation marks omitted)); *see also*

> Minn. Stat. § 204C.08, subd. 1d (2010) (voters in Minnesota "have the right to vote without anyone in the polling place trying to influence [their] vote"). Given the statements made by the apparel and buttons, and the singular purpose of the polling place, it is inconsequential that the institutional Plaintiffs are not political parties, that the institutional Plaintiffs do not endorse political candidates, and that there was no ballot measure on voter identification on the November 2, 2010, ballot. The Court finds section 211B.11 constitutional as applied.

Minnesota Majority, 789 F.Supp.2d at 1123-24. The summary judgment record now before the Court compels this conclusion anew here.

At bottom, the evidence in the record cannot reasonably be construed but to demonstrate that the Plaintiffs' Tea Party apparel constitutes a "political badge, political button, or other political insignia" under Minn. Stat. § 211B.11, subd. 1, that it is "[m]aterial promoting a group with recognizable political views" under the Election Day Policy, and that prohibiting it from the polling place on election day is a reasonable means of achieving the state's legitimate interest in protecting voters from politicking at the polls. Regardless of whether the Tea Party endorses candidates or takes official positions on ballot questions, it is undisputed that the Tea Party's explicit goal is "attract, educate, organize, and mobilize citizens to secure public policy consistent

with [its] three core values of Fiscal Responsibility, Constitutionally Limited Government and Free Markets," and that it attempts to advance those values in the public realm by engaging in various ways with the elections process and electoral politics, both locally in Minnesota and nationally. And whatever the Plaintiffs' subjective views on the message they intend to convey by wearing apparel with the name, shield, and slogans of the Tea Party to the polls on election day, the evidence is that the Tea Party is widely recognized by the general public and generally considered to be most closely associated, if not always aligned, with the Republican party and Republican politicians.

In short, the Plaintiffs' insistence that their Tea Party apparel cannot reasonably fall within the viewpoint-neutral prohibition on politicking contained in Minn. Stat. § 211B.11, subd. 1 and the Election Day Policy because the Tea Party is not "political" is unavailing. The facts before the Court cannot support such a position. Because the record demonstrates that barring the Plaintiffs from wearing their Tea Party apparel to the polling place is reasonable in light of the purpose that forum serves, the Defendants are entitled to summary judgment. It is therefore granted.

Based on the record, files, and proceedings herein, and for the reasons discussed above, IT IS ORDERED THAT:

1. The Hennepin County Defendants' Motion for Summary Judgment [ECF No. 133] is GRANTED.

2. The Defendant Secretary of State's Motion for Summary Judgment [ECF No. 142] is GRANTED.

3. The Ramsey County Defendants' Motion for Summary Judgment [ECF No. 148] is GRANTED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: March 23, 2015

s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Majority, et al.,

Plaintiffs,

v. No. 10-cv-4401 (JNE/SER)
ORDER

Joe Mansky, in his official capacity as the Elections Manager for Ramsey County, et al.,

Defendants.

This case is before the Court on a motion to dismiss or for summary judgment brought by Defendant Mark Ritchie, the Minnesota Secretary of State. In response, the Plaintiffs have filed their own motion requesting that the Court deny or delay disposition of that motion under Federal Rule of Civil Procedure 56(d).

For the reasons discussed below, Ritchie's motion is granted in part and denied in part, while the Plaintiffs' motion, except insofar as it is moot, is denied.

Background

This action was filed in the days before the November 2, 2010, general election by several individual and institutional Plaintiffs against the

Minnesota Secretary of State and Hennepin and Ramsey county election officials. The goal of the suit was to prevent the Defendants from prohibiting voters from wearing Plaintiff Election Integrity Watch's "Please I.D. Me" buttons as well as hats and t-shirts bearing the insignia and slogans of Plaintiff North Star Tea Party Patriots to the polls.

At the center of the case, then, is Minn. Stat. § 211B.11, subd.1. That provision of state law reads in relevant part as follows:

> A person may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100 feet of the building in which a polling place is situated, or anywhere on the public property on which a polling place is situated, on primary or election day to vote for or refrain from voting for a candidate or ballot question. A person may not provide political badges, political buttons, or other political insignia to be worn at or about the polling place on the day of a primary or election. A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day. This section applies to areas established by the county auditor or municipal clerk for absentee voting as provided in chapter 203B.

After filing their Complaint, the Plaintiffs quickly sought a temporary restraining order and preliminary injunction. The Court denied the motion on the eve of the general election.

Virtually immediately afterward, an individual in Secretary Ritchie's office sent an email to all of the county elections officers in the state. Attached to that email was a memorandum, which the parties refer to as the Election Day Policy. It reads as follows (emphasis in original):

> Please use the following process when dealing with an individual who is displaying political or campaign material in the polling place.
>
> 1. Minnesota law prohibits persons from wearing "political badges, political buttons, or other political insignia" or displaying campaign material within the polling place.
>
> 2. Election judges have the authority to decide what is "political." Examples include, but are not limited to:
>
> - Any item including the name of a political party in Minnesota, such as the Republican, DFL, Independence, Green or Libertarian parties.
>
> - Any item ir cluding the name of a candidate at any election.

- Any item in support of or opposition to a ballot question at any election.

- Issue oriented material designed to influence or impact voting (including specifically the "Please I.D. Me" buttons).

- Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on).

3. If a person is wearing political material, you should do the following:

- Explain that state election law prohibits displaying political materials in the polling place. (Minnesota Statutes 211B.11, subdivision 1.)

- Ask the individual to either cover up or remove the political material while in the polling place.

- If they refuse, explain that eligible voters will be allowed to vote, but any refusal will be recorded and referred to appropriate authorities.

> 4. Even if a voter refuses to do so, you must permit any eligible voter to receive a ballot and vote.
>
> 5. Record the name and address of a voter from the polling place roster in the incident log, along with a brief description of the item (button, hat, t-shirt, etc.) that the voter refused to remove or cover up.
>
> 6. Election judges and official challengers are prohibited from displaying political or campaign material in the polling place. If they refuse to remove the political or campaign material, you can ask them to leave.

After the general election was held, the Plaintiffs filed an Amended Complaint asserting three claims under 42 U.S.C. § 1983: at Count I, for a violation of their First Amendment rights; at Count II, for a violation of their right to Due Process under the Fourteenth Amendment; and at Count III, for a violation of their right to Equal Protection under the Fourteenth Amendment. The Plaintiffs also assert in Count IV that Minn. Stat. § 211B.11, subd. 1 is unconstitutional under the First Amendment.

The Defendants subsequently moved to dismiss the Amended Complaint, with three motions filed, respectively, by Secretary Ritchie, the Hennepin County election officials, and the Ramsey County election officials. In April of 2011, the Court granted those motions, finding that the Plaintiffs' First

Amendment challenges failed under both facial and as-applied analyses, while also rejecting their Due Process and Equal Protection claims.

The Plaintiffs appealed the dismissal of their First Amendment and Equal Protection claims. In a decision issued in March of 2013, the Eighth Circuit affirmed the dismissal of the Equal Protection claim and the First Amendment facial challenge, but reversed and remanded the First Amendment as-applied challenge. *Minnesota Majority v. Mansky*, 708 F.3d 1051 (8th Cir. 2013).

Following that decision, the Plaintiffs filed a petition for a writ of certiorari with the Supreme Court, and the remand proceedings in the district court were stayed pending its outcome. The Plaintiffs' certiorari petition was denied in December of 2013, and after the parties stipulated to the lifting of the stay in July of 2014, Secretary Ritchie filed the instant motion.

Discussion

There are two aspects to the motion that Ritchie has brought. First, Ritchie argues that he should be dismissed from the case on Eleventh Amendment immunity and standing grounds under Federal Rule of Civil Procedure 12. In the alternative, Ritchie argues that summary judgment is warranted because the Plaintiffs' as-applied First Amendment challenge fails on its merits under the Rule 56 standard.

The Court considers both of these arguments in turn.

I. Eleventh Amendment immunity and standing.

On the Rule 12 portion of his motion, Ritchie argues that he is not a proper defendant for two reasons: first, because the Amended Complaint does not contain sufficient factual content to establish that the Plaintiffs have standing to sue him; and second, because the Amended Complaint does not seek the only form of relief – prospective injunctive relief – that is available against a state official being sued in his official capacity under the Eleventh Amendment and the *Ex Parte Young* doctrine.

This is unpersuasive. Ritchie previously made the same Eleventh Amendment immunity argument on the motion to dismiss that he filed in December of 2010. In the decision that issued in April of 2011, the Court did not reach that issue in light of its determination that the case as a whole could not go forward because the Amended Complaint failed to state a claim upon which relief can be granted. This was consistent with Eighth Circuit precedent. *E.g.*, *Friends of Lake View School District Incorporation No. 25 of Phillips County v. Beebe*, 578 F.3d 753, 763 n.14 (8th Cir. 2009) (noting that "we need not decide whether [the defendant] would be entitled to claim sovereign immunity under the Eleventh Amendment" where the complaint is dismissed for failure to state a claim under Rule 12(b)(6)).

When the Plaintiffs appealed the dismissal of the Amended Complaint, Ritchie pressed his immunity argument anew before the Eighth Circuit, while also raising his standing challenge for the first time. Brief and Addendum of Appellee Mark Ritchie at 22-35, *Minnesota Majority v. Mansky*, 708 F.3d 1051 (8th Cir. 2013) (No. 11-2125). In its decision, the Eighth Circuit did not address either of these arguments, but did "reverse and remand the [Plaintiffs'] as-applied First Amendment claim" – as to all Defendants – "so that [this Court] may '(1) properly analyze the motion as a request for summary judgment through application of the standards articulated in Rule 56 and (2) give the parties sufficient opportunity to create an acceptable record . . . .'" *Minnesota Majority*, 708 F.3d at 1059 (quoting *McAuley v. Fed. Ins. Co.*, 500 F.3d 784, 788 (8th Cir. 2007)).

The Eighth Circuit could not have ordered what it did – that the case proceed in the district court, without Ritchie's dismissal – if either of his arguments had merit. As Ritchie correctly notes, standing is a "threshold question" that bears on the federal courts' jurisdiction to hear a case. *281 Care Committee v. Arneson*, 638 F.3d 621, 627 (8th Cir. 2011). As such, Ritchie was free to raise standing for the first time on appeal. *See Constitution Party of S.D. v. Nelson*, 639 F.3d 417, 420 (8th Cir. 2011). When he did so, the Eighth Circuit was obliged to consider the issue "before all other questions." *Pub. Sch. Ret. Sys. of Mo. v. State St. Bank & Trust Co.*, 640 F.3d 821, 825 (8th Cir. 2011) (quoting *Ginters v. Frazier*, 614 F.3d 822, 826 (8th Cir. 2010)).

In addition, the Eleventh Amendment does not simply protect states and state officials from liability; where it applies, it grants them a constitutional "right not to be sued in federal court." *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144- 46 (1993). Because "the value to the States of their Eleventh Amendment immunity . . . is for the most part lost as litigation proceeds past motion practice," a court may not allow a case to proceed against a defendant who has a valid Eleventh Amendment defense. *Id. See also Edelman v. Jordan*, 415 U.S. 651, 678 (1974) ("[I]t has been well settled . . . that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court[.]").

For these reasons, the rejection of Ritchie's standing and immunity arguments is the sine qua none of, and thus implicit in, the Eighth Circuit's disposition of the Plaintiffs' appeal and the remand it ordered. This Court is bound by that determination.

The Rule 12 portion of Ritchie's motion is therefore denied.

II. Summary judgment.

In the alternative to his Rule 12 arguments, Ritchie argues that the only claim that remains in this case—the Plaintiffs' as-applied First Amendment challenge to Minn. Stat. § 211B.11, subd. 1 and the Election Day Policy—fails under the Rule 56 summary judgment standard.

In reviewing the Court's 2011 dismissal of that claim on the Defendants' initial round of motions under Rule 12(b)(6), the Eighth Circuit explained that "[u]nder the First Amendment, the statute and Policy are constitutional as applied to [the Plaintiffs] if their application to [them] is viewpoint neutral and 'reasonable in light of the purpose which the forum at issue serves.'" *Minnesota Majority*, 708 F.3d at 1059 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)). On the first prong of that analysis, the Eighth Circuit affirmed that both the statute and the Policy are viewpoint neutral: the statute "applies to all political material, regardless of viewpoint [and] does not define 'political' to include or exclude any view," *id.* at 1057, while the Policy likewise "do[es] not exclude any party, material, or group from the Policy's application and do[es] not favor or disfavor any view," *id.* at 1059.

On the second prong, however, the Eighth Circuit found that the Court had relied on "matters outside the pleadings"—in contravention of Rule 12(b)(6)—for its conclusion that the Defendants reasonably applied the statute and Policy to the Plaintiffs. Therefore, the Eighth Circuit, as noted above, "revers[ed] and remand[ed] the as-applied First Amendment claim to the district court so that it may '(1) properly analyze the motion as a request for summary judgment through application of the standards articulated in Rule 56 and (2) give the parties sufficient opportunity to create an acceptable record . . . .'" *Id.* (quoting *McAuley v. Fed. Ins. Co.*, 500 F.3d 784, 788 (8th Cir. 2007)).

Accordingly, Ritchie has moved for summary judgment here. Under Rule 56, summary judgment will be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The movant must support his assertion that there is no genuine dispute either "by citing to particular parts of materials in the record" or by showing that the nonmovant "cannot produce admissible evidence to" create a genuine dispute. *Id.* (c)(1). This record evidence "and all fair inferences from it" are viewed "in the light most favorable to the non moving party." *Johnson v. Blaukat*, 453 F.3d 1108, 1112 (8th Cir. 2006).

To be entitled to judgment as a matter of law, Ritchie must establish that excluding the Plaintiffs' buttons and apparel from the polls is "reasonable in light of the purpose which [that] forum . . . serves." *Minnesota Majority*, 708 F.3d at 1059 (citation omitted). The Eighth Circuit determined that "[t]he state has a legitimate interest in 'maintain[ing] peace, order, and decorum' in the polling place," as well as a "compelling interest in 'protecting voters from confusion and undue influence' and 'preserving the integrity of its election process.'" *Id.* at 1057 (citations omitted).

For summary judgment to be granted, then, Ritchie must use the factual record to show that the Defendants' application of the statute and the Policy to the Plaintiffs is reasonably related to these state interests. In other words, the question is whether Ritchie has borne his burden of identifying undisputed or indisputable facts in the record that would

demonstrate that excluding the Plaintiffs' buttons and apparel from the polling place is rationally related to the state's interests in maintaining the decorum of the polls, preserving the integrity of elections, and protecting voters from confusion and undue influence.

A. "Please I.D. Me" buttons.

With regard to the "Please I.D. Me" buttons, Ritchie has satisfied that burden. Ritchie points to a printout of a page from Election Integrity Watch's website detailing its "Action Plan" for the 2010 general election. That page contains the following instructions:

> When you go to vote on November 2, wear your Election Integrity Watch button and show your photo ID when you sign-in [sic] to vote. While Minnesota does not require an individual to show an ID, let's act like it does. This simple act of showing an ID will likely result in a spontaneous reaction from others in line behind you to show their ID as well. Any person in line thinking about committing voter impersonation will likely be dissuaded from doing so. (Although polls show that over 80% of Minnesotans support requiring a photo ID to vote, this measure has been repeatedly block [sic] by leaders in the Minnesota state legislature.)[1]

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[1] The Plaintiffs themselves submitted a printout of this "Action Plan" along with other documents in support of their Motion for a Temporary Restraining Order and Preliminary

Furthermore, an additional printout from the website notes that Minnesota Voters Alliance—one of Election Integrity Watch's three constituent organizations (along with Minnesota Majority and the North Star Tea Party Patriots) and a co-Plaintiff with it here, Amended Complaint ¶ 10—is "currently working to pass voter photo ID [requirements] in both state and city government."[2]

The Plaintiffs do not dispute this evidence in any way, whether as to its meaning, its authenticity or admissibility, or on any other ground. *See* Fed. R. Civ. P. 56(c)(1)(B) (requiring "a party asserting that a fact . . . is genuinely disputed" to "show[] that the materials cited do not establish the absence . . . of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact").

The undisputed evidence before the Court, then, is both that Plaintiff Election Integrity Watch intended that their "Please I.D. Me" buttons be used as part of an orchestrated effort to falsely intimate to voters in line at the polls that photo identification is

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Injunction at the very outset of this case. *See* Kaardal Declaration Ex. 5 at 13, ECF No. 8-6.

At oral argument, the Court requested that the Plaintiffs file a letter indicating whether those materials were provided to or otherwise brought to the attention of the Eighth Circuit on appeal. *See* Eighth Circuit R. 30A (governing the parties' preparation and submission of the designated record on appeal). The Plaintiffs submitted a letter that was nonresponsive to the Court's request.

[2] In the 2012 general election, Minnesota voters rejected a constitutional amendment that would have required photo identification for voting.

required in order to vote in Minnesota, and that Plaintiff Election Integrity Watch – whose name, website, and phone number are featured prominently on the buttons – is connected to a campaign that aims to change state and local laws such that voters would be required to present photo identification at the polls. The Plaintiffs offer nothing in the way of evidence or argument to counter the obvious conclusion that flows from these facts: that precluding the Plaintiffs from wearing these buttons in the polling place – whether a voter identification measure is on the ballot or not – is rationally related to the state's interests in protecting voters from confusion and undue influence and in preserving the decorum of the polls and the integrity of elections.

The Plaintiffs do argue that the Eighth Circuit remanded the case with directions for the parties to "engage in the discovery process[,] including the requisite demands of Federal Rule of Civil Procedure 26." According to the Plaintiffs, "[t]o short-circuit the [discovery] process" – such as by granting any aspect of Ritchie's motion here – "is to invite rebuke from the appellate court."

The Plaintiffs' position, however, is not true to the Eighth Circuit's decision. In remanding the First Amendment as-applied claim, the Eighth Circuit cited Rule 12(d) and instructed the Court to "properly analyze *the motion*" – i.e., the Defendants' Rule 12(b)(6) motions – "as a request for summary judgment [and] give the parties sufficient opportunity to create an acceptable record." *Minnesota Majority*, 708 at 1059 (emphasis added). Neither Rule 12(d) nor the Eighth Circuit's decision contains any

requirement that the Court defer disposition until full discovery has been had in accordance with Rule 26. Instead, Rule 12(d) requires only that the nonmovant be put on notice that the motion before the Court will be considered under the Rule 56 standards, such that the nonmovant has "a reasonable opportunity to present all the material that is pertinent to th[at] motion."

Because Ritchie filed this portion of his motion explicitly as a motion for summary judgment, there can be no doubt that the Plaintiffs have been given the requisite notice and have had ample opportunity to submit whatever material they deem relevant to the Court's decision. Despite that opportunity, the Plaintiffs offered nothing to rebut Ritchie's summary judgment argument with respect to the "Please I.D. Me" buttons.

That said, the Plaintiffs do argue – in fact, they filed a separate motion of their own to this effect – that the Court should deny or defer ruling on Ritchie's summary judgment motion on the ground that "discovery will provide rebuttal evidence to [his] claim that there are no genuine issues of fact." To obtain a continuance or other relief under Rule 56(d), the party opposing summary judgment must show that the motion is premature by "filing an affidavit affirmatively demonstrating . . . how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact." *Toben v. Bridgestone Retail Operations, LLC*, 751 F.3d 888, 894 (8th Cir. 2014) (internal quotation and citations omitted).

The Plaintiffs' affidavit and arguments are inadequate to warrant Rule 56(d) relief. According to their affidavit, the Plaintiffs seek discovery on the following issues:

- "the number of times an election judge has entered the name of a person in a precinct log to be reported to appropriate authorities under the Secretary's election day policy (of November 2010) since November 2010 and whether the Secretary obtained reports or was kept abreast of those log entries";

- "whether the Secretary or any election judge failed to identify for possible civil or criminal prosecution organizations known to the Secretary to endorse candidates who wore or may have worn apparel or buttons supporting a particular political philosophy or position held by a candidate on the ballot or ballot question";

- "whether there were further oral or written communications between the Secretary and election managers or others regarding the spot enforcement of Minnesota Statute § 211B.11 of

the Secretary's election day policy";

- "whether there were further oral or written communications between the Secretary and county attorneys regarding the spot enforcement of Minnesota Statute § 211B.11 of the Secretary's election day policy";

- "what information the Secretary of State received from County Auditors, Election Managers, or County Attorneys or other officials since November 2010 related to the enforcement of the directive disseminated to county auditors and election manages in November 2010";

- "how the Secretary determined that inert, passive wearing of apparel is disruptive or has the potential of being disruptive in a polling place";

- "what interests of the State the Secretary is protecting as it relates to inert, passive wearing of apparel as it applies to, for instance, 'Liberty' or 'Don't read on me'";

- "the specific 'rational basis' of the Secretary of State to direct election judges o report perceived offenders of Minnesota Statute § 211B.11. The basis does not appear to be articulated in the Secretary of State's motion to dismiss or in the alternative for summary judgment";

- "how the Secretary perceives th[e] 'fact' [that the U.S. House of Representatives recognized a Tea Party caucus consisting entirely of Republican members in July 2010] and how it is applied to the election day policy it advocated and continues to advocate."

None of these matters have any relevance to the crux of Ritchie's motion with respect to the "Please I.D. Me" buttons. The material facts at issue are that Plaintiff Election Integrity Watch intended that its buttons be used in an effort to mislead voters about voter identification requirements at the polls, and that Election Integrity Watch and the buttons are tied to a campaign to change state and local elections laws with respect to those requirements. Because the Plaintiffs do not contest those facts, and the discovery they seek is irrelevant to them, Ritchie has shown that prohibiting the Plaintiffs from wearing the buttons to the polls is rationally related to the state's legitimate interests in protecting voters from confusion and undue influence, ensuring order and decorum at the

polls, and safeguarding the integrity of the voting process.

As to the portion of the as-applied First Amendment claim that relates to the "Please I.D. Me" buttons, then, Ritchie's motion for summary judgment is granted and the Plaintiffs' Rule 56(d) motion is denied.

B. North Star Tea Party Patriots' hats and t-shirts.

However, the portion of Ritchie's summary judgment motion that relates to the North Star Tea Party Patriots' apparel is a different matter. As with the analysis of the "Please I.D. Me" buttons, the relevant question here is whether Ritchie has borne his burden of identifying undisputed or indisputable facts in the record that would demonstrate that prohibiting the Plaintiffs from wearing the North Star Tea Party Patriots' apparel to the polling place is rationally related to the state's interests in maintaining the decorum of the polls, preserving the integrity of elections, and/or protecting voters from confusion and undue influence.

He has not. Ritchie only points to "[d]ocumentation pertaining to the Congressional Tea Party Caucus," with no explanation of its relevance or analysis of how it could demonstrate the absence of a genuine dispute of material fact. Ritchie has thus failed to satisfy his burden of establishing his entitlement to summary judgment with respect to the portion of the First Amendment as-applied claim relating to the North Star Tea Party Patriots' apparel.

See Fed. R. Civ. P. 56(c)(1) (requiring the "party asserting that a fact cannot be . . . genuinely disputed [to] support the assertion"); *Foster v. Johns-Manville Sales Corp.*, 787 F.2d 390, 393 (8th Cir. 1986) ("Where the moving party fails to satisfy its burden to show initially the absence of a genuine issue concerning any material fact, summary judgment must be denied even if no opposing evidentiary matter is presented.").

This aspect of Ritchie's motion is therefore denied without prejudice. Because of that ruling, the aspect of the Plaintiffs' Rule 56(d) motion bearing on these issues is moot.

Based on the record, files, and proceedings herein, and for the reasons discussed above, IT IS ORDERED THAT:

1. Defendant Mark Ritchie's Motion to Dismiss or for Summary Judgment [ECF No.110] is GRANTED IN PART and DENIED IN PART consistent with the memorandum above.

2. Plaintiffs' Motion for an Order under Fed. R. Civ. P. 56(d) [ECF No. 117] is DENIED IN PART and DENIED AS MOOT IN PART consistent with the memorandum above.

Dated: October 15, 2014.

s/Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge

United States Court of Appeals
For the Eighth Circuit

No. 11-2125

Minnesota Majority; Minnesota Voters Alliance; Minnesota Northstar Tea Party Patriots; Election Integrity Watch; Susan Jeffers, individually and as an election judge; Dorothy Fleming; Jeff Davis; Dan McGrath; Andy Cilek

Plaintiffs - Appellants

v.

Joe Mansky, in his official capacity as the Elections Manager for Ramsey County; Rachel M. Smith, in her official capacity as the Elections Manager for Hennepin County; Mike Freeman, in his official capacity as Hennepin County Attorney; John J. Choi, in his official capacity as Ramsey County Attorney; Mark Ritchie, in his official capacity as Secretary of State; Susan Gaertner, in her individual capacity

Defendants - Appellees

Appeal from United States District Court
for the District of Minnesota - Minneapolis

Submitted: February 14, 2012
Filed: March 6, 2013 (Corrected 03/13/2013)

Before GRUENDER, BENTON, and SHEPHERD, Circuit Judges.

BENTON, Circuit Judge.

Several groups interested in electoral and governmental reform sued the Secretary of State, and Ramsey and Hennepin county election officials ("Minnesota"). Minnesota moved for dismissal, which the district court granted. The groups appeal as to the claims under the First Amendment and the Equal Protection clause.[1] Jurisdiction being proper under 28 U.S.C. § 1291, this court affirms in part, reverses in part, and remands.

I.

Election Integrity Watch ("EIW") is comprised of Minnesota Majority, Minnesota Voters Alliance, and the North Star Tea Party Patriots. These groups assert as their mission the improvement of government and governmental processes. Minnesota Majority and Minnesota Voters Alliance advocate electoral reforms. None is a political party, and none endorsed a candidate or ballot issue in the November 2010 election. Before the election, EIW produced "Please I.D. Me" buttons. North Star Tea Party Patriots produced hats and t-shirts with Tea Party logos. The t-shirts also featured either a drawing of a shield or one of several slogans, including: "Don't tread on me," "Liberty," "We'll Remember in November," and "Fiscal Responsibility, Limited Government, Free Markets."

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[1] The groups assert the same claims under the Minnesota Constitution. These claims are evaluated using the same standard as those under the U.S. Constitution. *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 516 (Minn. 2012).

Shortly before the November 2010 election, EIW sought to enjoin the enforcement of the third sentence of Minn. Stat. § 211B.11, subd. 1: "A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day." Violation of this sentence is a petty misdemeanor. Minn. Stat. § 211B.11, subd. 4. The first sentence of Minn. Stat. § 211B.11, subd. 1 generally prohibits displaying campaign material or trying to persuade a voter about a candidate or ballot question within a polling place or within 100 feet of the polling place's building.

On the eve of the election, the district court denied a temporary restraining order. Minnesota then distributed an Election Day Policy explaining the statutory ban on political materials in polling places. The Policy gives examples of political materials, including: "[i]ssue oriented material designed to influence or impact voting (including specifically the 'Please I.D. Me' buttons)" and "[m]aterial promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)." The Policy instructed election judges to ask persons wearing political material to cover or remove it. If they refused, the Policy instructed election judges to record their names and addresses for potential prosecution but to permit them to vote.

At least three EIW members were affected by the Policy. One was asked to cover or remove his t-shirt. Another who refused to cover or remove his button had his name and address recorded. Yet another who was wearing both a t-shirt and a button was delayed several hours before voting. EIW asserts

that the fear of prosecution stopped others from displaying the apparel. Still others who were wearing materials from EIW and other similar organizations voted without incident.

After the election, EIW amended its complaint to challenge the constitutionality of Minn. Stat. § 211B.11, subd. 1 and the Policy issued under it. The district court granted Minnesota's motion to dismiss.

This court reviews de novo the grant of a motion to dismiss for failure to state a claim. *Butler v. Bank of Am., N.A.*, 690 F.3d 959, 961 (8th Cir. 2012). Reviewing a dismissal under Rule 12(b)(6), this court assumes all facts in the complaint to be true and construes all reasonable inferences from those facts most favorably to the complainant. *Id.* Although a complaint need not contain "detailed factual allegations," it must contain facts with enough specificity "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), *citing Twombly*, 550 U.S. at 555.

A court reviewing a motion to dismiss may also "consider some public records, materials that do not contradict the complaint, or materials that are 'necessarily embraced by the pleadings.'" *Noble Sys. Corp. v. Alorica Cent., LLC*, 543 F.3d 978, 982 (8th Cir. 2008), *quoting Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999). The complaint refers to the Policy. The parties rely on it in their briefs. No party disputes its contents or authenticity. No party

challenged the district court's consideration of it, and this court will likewise consider it as "necessarily embraced by the pleadings."

II.

EIW alleges that Minn. Stat. § 211B.11, subd. 1 is facially unconstitutional. To succeed in a typical facial attack, EIW would have to establish "that no set of circumstances exists under which [§ 211B.11, subd. 1] would be valid," or that the statute lacks any "plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, ___, 130 S. Ct. 1577, 1587 (2010). A First Amendment case is "a second type of facial challenge": a law may be invalidated as overbroad if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.*, *quoting Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008). "To be facially invalidated under this doctrine, the overbreadth of an ordinance affecting both conduct and pure speech must be both 'real' and 'substantial' in relation to its 'plainly legitimate sweep.'" *Excalibur Grp., Inc. v. City of Minneapolis*, 116 F.3d 1216, 1224 (8th Cir. 1997), *quoting New York v. Ferber*, 458 U.S. 747, 769-70 (1982).

The First Amendment prohibits laws "abridging the freedom of speech." U.S. Const. amend. I. "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal*

Def. & Educ. Fund, Inc., 473 U.S. 788, 799-800 (1985). The Supreme Court has "adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Id.* at 800.

In *Burson v. Freeman*, 504 U.S. 191 (1992), a Tennessee statute prohibited "campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question" within 100 feet of the entrance to a polling place and the building in which it was located. *Burson*, 504 U.S. at 193-94. The plurality noted that the "campaign-free" zones included sidewalks and streets adjacent to the polling places, thus banning speech in public forums. *Id.* at 196 & n.2. Because it banned content-based speech in public forums, the Tennessee statute was subject to strict scrutiny, which requires that the state show that the restriction is necessary and narrowly tailored to achieve a compelling state interest. *Id.* at 198-99. The Supreme Court ruled that this was the rare case where a law survived strict scrutiny because of the long history, substantial consensus, and "simple common sense" showing that restrictions around polling places are necessary to protect the states' compelling interests in preventing voter intimidation and election fraud. *Id.* at 206, 211.

EIW's challenge includes the first sentence of Minn. Stat. § 211B.11, subd. 1 (prohibiting solicitation inside or within 100 feet of the polling place). To that

extent, the *Burson* case defeats a facial attack on the first sentence of Minn. Stat. § 211.B11, subd. 1.

The third sentence of the Minnesota statute applies only within ("at or about") the polling place. Minn. Stat. § 211B.11, subd.1 ("A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day."). A polling place is a nonpublic forum. *See, e.g., PG Publ'g Co. v. Aichele*, 705 F.3d 91, ___ n.10, 2013 WL 150138, at *5 n.10 (3d Cir. Jan. 15, 2013); *Marlin v. D.C. Bd. of Elections & Ethics*, 236 F.3d 716, 719 (D.C. Cir. 2001); *see also Poniktera v. Seiler*, 104 Cal. Rptr. 3d 291, 302 (Cal. Ct. App. 2010) ("The comments of both Justice Scalia's concurring opinion in *Burson*, as well as the dissent, confirm our reading that *Burson* understood it was *not* approving the application of strict scrutiny to restrictions on conduct *within* the confines of the polling station . . . .").

EIW believes that by Eighth Circuit precedent, a polling place is a public forum. This court has stated in passing that "the area containing the voting booths" was "a designated public forum" on the date it was being used for voting. *Embry v. Lewis*, 215 F.3d 884, 888 (8th Cir. 2000). The *Embry* court was not performing a forum analysis of the polling area for free speech purposes, as shown by its lack of analysis or citation of precedent on this point. The *Embry* court did not cite *Burson*. The use of *Embry*'s passing comment to assert that a polling place is a public forum has rightly been rejected in another circuit. *See United Food & Commercial Workers Local 1099 v. City*

of Sidney, 364 F.3d 738, 749 (6th Cir. 2004). The polling place itself is a nonpublic forum.

A restriction on speech in a nonpublic forum is not subject to strict scrutiny and is permissible if it is viewpoint neutral and "reasonable in light of the purpose which the forum at issue serves." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46-49 (1983). The third sentence of the Minnesota statute is viewpoint neutral because it applies to all political material, regardless of viewpoint. It does not define "political" to include or exclude any view.

Restrictions on speech in a nonpublic forum, to be valid, must also be "reasonable in light of the purpose which the forum at issue serves." *Id.* at 49. The state has a legitimate interest in "maintain[ing] peace, order and decorum" in the polling place. *Mills v. Alabama*, 384 U.S. 214, 218 (1966). A state also has a compelling interest in "protecting voters from confusion and undue influence" and "preserving the integrity of its election process." *Burson*, 504 U.S. at 199 (citations and internal quotation marks omitted). The statute prohibits the wearing of a "political badge, political button, or other political insignia" in the polling place.[2] The Supreme Court has held that a statute restricting speech "related to a political campaign" in the *public* forum *outside* the polling place survives strict scrutiny. *Id.* at 196-97, 211.

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[2] EIW notes that the statute does not define "political." EIW, however, does not include the word "vague" or "vagueness" in its argument to this court. EIW has waived its vagueness challenge by failing to brief it to this court. *United States v. Frook*, 616 F.3d 773, 777 n.2 (8th Cir. 2010).

Because a statute restricting speech related to a political campaign outside the polling place survives strict scrutiny, the Minnesota statute, to the extent it restricts speech about a political campaign inside the polling place, is "reasonable in light of the purpose which the forum at issue serves." *Perry Educ. Ass'n*, 460 U.S. at 49. The "decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only reasonable limitation." *Cornelius*, 473 U.S. at 808; *see also Marlin*, 236 F.3d at 720 ("That narrower regulations might be as effective or more so . . . does not invalidate the means . . . chosen.") The statute here has a "plainly legitimate sweep" when it prohibits speech about a political campaign.[3]

EIW's complaint states that Minnesota has applied the statute to material that does not attempt to persuade or influence voters to vote for or against any particular political party, candidate, or question on the ballot. Other courts have applied *Burson* to uphold bans on material unrelated to any issue on the ballot. *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1218-19 (11th Cir. 2009) (per curiam) (relying on *Burson* to find constitutional a statute that prohibited solicitation

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[3] The dissent suggests that Minnesota's action is unconstitutional absent examples of actual disruption. That showing is not required. *See, e.g., Burson*, 504 U.S. at 206-07; *Perry Educ. Ass'n*, 460 U.S. at 52 & n.12; *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1220 & n.15 (11th Cir. 2009) (per curiam) ("The *Burson* plurality opinion teaches us that the State need not wait for actual interference or violence or intimidation to erupt near a polling place for the State to act.").

that targeted voters exiting polling places and that concerned matters unrelated to any issue on the ballot); *Schirmer v. Edwards*, 2 F.3d 117, 122-23 (5th Cir. 1993) (finding constitutional a "total ban on politicking," including "buttons and T-shirts," within a 600-foot radius of the polling place).[4] Even if Minnesota acted unreasonably in applying its statute to some material, the complaint does not allege that there were a "substantial number" of such unreasonable applications in relation to the statute's reasonable applications. *See Wash. State Grange*, 552 U.S. at 449 n.6. "[W]hatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, 413 U.S. 601, 615-16 (1973).

EIW has failed to state a facial claim under the First Amendment against Minn. Stat. § 211B.11, subd. 1.[5]

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[4] Contrary to the dissent's assertion, it is of no consequence that *Browning* and *Schirmer* address laws regulating exit polling (after citizens already voted). "[C]ommotion tied to exit solicitation is as capable of intimidating and confusing the electorate and impeding the voting process – even deterring potential voters from coming to the polls – as other kinds of political canvassing or political action around the polls." *Browning*, 572 F.3d at 1219. Moreover, both statutes passed strict scrutiny (more exacting than here) asserting state interests *identical* to those in *Burson*: protecting the voters from confusion and undue influence, and preserving the integrity and reliability of elections. *Id.*; *Schirmer*, 2 F.3d at 120.

[5] EIW's new argument that some state officials are Democrats (and its organization's members are not) is not enough to state a plausible claim for First Amendment retaliation.

III.

EIW claims that the statute and the Election Day Policy are unconstitutional as applied. "An as-applied challenge consists of a challenge to the statute's application only as-applied to the party before the court." *Republican Party of Minn., Third Cong. Dist. v. Klobuchar*, 381 F.3d 785, 790 (8th Cir. 2004). "If an as-applied challenge is successful, the statute may not be applied to the challenger, but is otherwise enforceable." *Id.; see Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 893 (2010) (holding that the distinction between a facial challenge and an as-applied challenge "goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint").

A.

Under the First Amendment, the statute and Policy are constitutional as applied to EIW if their application to EIW is viewpoint neutral and "reasonable in light of the purpose which the forum at issue serves." *Perry Educ. Ass'n*, 460 U.S. at 49. As discussed, the statute is viewpoint neutral. The Policy is also viewpoint neutral. It recites as examples of "political": "the name of political party in Minnesota, such as the Republican, DFL, Independence, Green or Libertarian parties"; items "in support of or opposition to" any ballot question; "[i]ssue oriented material designed to influence or impact voting (including specifically the 'Please I.D. Me' buttons"; and "[m]aterial promoting a group with recognizable political views (such as the Tea Party, MoveOn.org,

and so on)." The examples in the Policy do not exclude any party, material, or group from the Policy's application and do not favor or disfavor any view.

As to the reasonableness of the statute's and Policy's application to EIW, the district court considered "matters outside the pleadings." *See* Fed. R. Civ. P. 12(d). For example, the district court found that "[t]he language on the ["Please I.D. Me"] button intimates that government-issued identification should be – or is – required in order to vote in Minnesota. This intimation could confuse voters and election officials and cause voters to refrain from voting because of increased delays or the misapprehension that identification is required." The complaint does not include these facts; the district court "must have been referencing argument and evidence from some source outside the four corners of the complaint." *McAuley v. Fed. Ins. Co.*, 500 F.3d 784, 787 (8th Cir. 2007). Because the district court considered "matters outside the pleadings," it should have evaluated the motion under Rule 56. Fed. R. Civ. P. 12(d); *McAuley*, 500 F.3d at 788. This court reverses and remands the as-applied First Amendment claim to the district court so that it may "(1) properly analyze the motion as a request for summary judgment through application of the standards articulated in Rule 56 and (2) give the parties sufficient opportunity to create an acceptable record . . . ." *McAuley*, 500 F.3d at 788.

B.

EIW argues that the Minnesota statute and Policy denied it equal protection in violation of the

Fourteenth Amendment. "The Equal Protection Clause generally requires the government to treat similarly situated people alike." *Klinger v. Dep't of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994), *citing City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). To survive dismissal, EIW must allege that Minnesota treated it differently than similarly situated people. *Ganley v. Minneapolis Park & Recreation Bd.*, 491 F.3d 743, 747 (8th Cir. 2007).

EIW argues that election judges selectively enforced the statute and the Policy. Even if the complaint adequately described how the statute and Policy were enforced differently among similarly situated people (including among people who wore the "Please I.D. Me" buttons), the complaint must also allege that Minnesota caused the selective enforcement. *Madewell v. Roberts*, 909 F.2d 1203, 1208 (8th Cir. 1990) ("Liability under § 1983 requires a causal link to, and direct responsibility for, the deprivation of rights."). While causation is generally a question of fact, this court may decide the question as a matter of law where "the question is so free from doubt as to justify taking it from the [fact finder]." *Parrish v. Ball*, 594 F.3d 993, 1000 (8th Cir. 2010) (alteration in original), quoting *Ricketts v. City of Columbia*, 36 F.3d 775, 779-80 (8th Cir. 1994).

Because the statute and Policy do not "affirmatively sanction" selective enforcement, this court analyzes the claim against the municipalities and the official capacity defendants under the "deliberate indifference" standard of *City of Canton v. Harris*, 489 U.S. 378, 388 (1989). *Szabla v. City of Brooklyn Park, Minn.*, 486 F.3d 385, 390 (8th Cir.

2007) (en banc) ("Where a policy is constitutional on its face, but it is asserted that a municipality should have done more to prevent constitutional violations by its employees, a plaintiff must establish the existence of a 'policy' by demonstrating that the inadequacies were a product of deliberate or conscious choice by policymakers. The standard of fault in that situation is 'deliberate indifference' to constitutional rights." (internal citation omitted)). The complaint alleges only that the Policy's "standardless discretion" resulted in selective enforcement. The Policy's delegation of discretion to election judges did not, without more, cause selective enforcement. *See Dick v. Watonwan Cnty.*, 738 F.2d 939, 942-43 (8th Cir. 1984) (holding that a municipality's policy giving discretion to subordinates did not subject the municipality to liability for the subordinates' errors of judgment).

This court has not reviewed a suit against an individual-capacity defendant who wrote a policy so standardless that it caused selective enforcement. The closest analogy is suing an individual-capacity defendant for failure to train subordinates, causing selective enforcement. A supervisor may be individually liable for failure to train subordinates if it amounts to deliberate indifference to the rights of persons whom the subordinates harm. *Parrish*, 594 F.3d at 1002; *Andrews v. Fowler*, 98 F.3d 1069, 1078 (8th Cir. 1996) (applying the same standard from official-capacity failure to train to the individual-capacity allegation). The same "deliberate indifference" standard applies in this case. The election supervisors' Policy that delegated discretion to election judges did not, without more, cause selective enforcement. *See Dick*, 738 F.2d at 942 ("The

Board might have chosen to adopt more detailed guidelines, and such rules might have averted the mistake that was made in this case, but the Board's decision to rely on its employees' judgment is certainly not unconstitutional in and of itself . . . .").

EIW has failed to allege that Minnesota caused selective enforcement of the facially neutral statute and Policy, and has therefore failed to state an equal protection claim.

* * * * * * *

The judgment of the district court is affirmed in part, reversed in part, and the case remanded for proceedings consistent with this opinion.

SHEPHERD, Circuit Judge, concurring in part and dissenting in part.

I am pleased to concur with the majority's decision holding (1) that the district court improperly considered matters outside the pleadings when dismissing the plaintiffs' as-applied challenge and (2) that the plaintiffs have failed to state an equal protection claim. Because I respectfully disagree with the majority's conclusion that the statutory restrictions, which ban the wearing of any political insignia, are reasonable in light of the need to maintain "peace, order, and decorum," to "protect[] voters from confusion and undue influence," and to "preserv[e] the integrity of its election process" in the polling place, I dissent from the affirmance of the district court's dismissal of the plaintiffs' claim that the statute is facially unconstitutional.

As the majority points out, for the speech restrictions in the polling place to survive constitutional scrutiny, the restrictions must be "viewpoint neutral and 'reasonable in light of the purpose which the forum at issue serves.'" *See supra* at 6 (*quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983)). "The state has a legitimate interest in 'maintain[ing] peace, order and decorum' in the polling place[,]" *supra* at 7 (*quoting Mills v. Alabama*, 384 U.S. 214, 218 (1966)), "in 'protecting voters from confusion and undue influence' and 'preserving the integrity of its election process.'" *Supra* at 7 (*quoting Burson v. Freeman*, 504 U.S. 191, 199 (1992)). I have no reservations about the majority's conclusion that the statute is viewpoint neutral or that under *Burson*, it is constitutional to restrict speech inside the polling place about either political campaigns or issues that are on the ballot.[6]

I do not, however, agree that *Burson* may be applied to this statute to uphold the restrictions on the wearing of any political insignia in the polling place. The Tennessee statute at issue in *Burson* stated:

> Within the appropriate boundary as established in subsection (a) [100 feet

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[6] I also agree with the majority that EIW has waived any vagueness challenge by failing to brief it to this court. The district court likewise determined "that the Amended Complaint does not allege that Minnesota Statues section 211B.11 is void for vagueness." (Order at 14-15.) It would appear, then, that plaintiffs are not barred from raising such a challenge in the future.

> from the entrances], and the building in which the polling place is located, the display of *campaign* posters, signs or other *campaign* materials, distribution of *campaign* materials, and solicitation of votes for or against any person or political party or position on a question are prohibited.

Id. at 193-94 (emphasis added) (brackets in original) (quoting Tenn. Code Ann. § 2-7- 111(b) (Supp. 1991)). The Supreme Court noted that "[w]hether individuals may exercise their free speech rights near polling places [under the Tennessee statute] depends entirely on whether their speech is related to a political *campaign*." *Id.* at 197 (emphasis added). In his dissent, Justice Stevens points out that the Tennessee statute "silences all campaign-related expression, *but allows expression on any other subject*: religious, artistic, commercial speech, *even political debate and solicitation concerning issues or candidates not on the day's ballot.*" *Id.* at 223 (Stevens, J., dissenting) (emphasis added).

The majority cites *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213 (11th Cir. 2009) (per curiam) and *Schirmer v. Edwards*, 2 F.3d 117 (5th Cir. 1993) as cases that applied *Burson* to uphold bans on material unrelated to any issue on the ballot. *Supra* at 8. In both of those cases, however, the focus of the restrictions was the prevention of harassment of voters by exit solicitors seeking voter signatures on petitions as voters left the polls. *See Browning*, 572 F.3d at 1218-19; *Schirmer*, 2 F.3d at 122-23. I fail to see how this broad restriction,

which prohibits a voter from wearing any political emblem, insignia, or slogan that is unrelated to an issue or candidate on the ballot, would rationally and reasonably help maintain the "peace, order, and decorum" of the polling place, "protect[] voters from confusion or undue influence," or "preserv[e] the integrity of [Minnesota's] election process."[7] Further, the record in this case is devoid of facts which demonstrate that any disruption of the "peace, order, and decorum" of the Minnesota election process has occurred by virtue of voters wearing a political emblem, insignia, or slogan that is unrelated to an issue or candidate on the ballot. Although the existence of a disruption is not necessary before the state imposes reasonable limitations on speech, had such facts existed, then perhaps I could agree that the restrictions are reasonable. Without further development of the record to reflect how these restrictions are reasonable limits on free speech which rationally relate to the state's interest in maintaining order and preserving integrity at the polling place, I cannot join in the majority's rejection of plaintiffs' constitutional challenge on facial grounds.

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[7] For example, how does the wearing of a button or shirt bearing an American flag or the Star of David, which could arguably be considered political under this statute, disrupt the "peace, order, and decorum" of the voting booth? I do not accept that the presence of a passive and peaceful voter who happens to wear a shirt displaying, for example, the words "American Legion," "Veterans of Foreign Wars," "AFL-CIO," "NRA," "NAACP," or the logo of one of these organizations (all of which have actively participated in the political process) somehow causes a disruption in the polling place or confuses or unduly influences voters.

Accordingly, I respectfully dissent from the majority's affirmance of the district court's dismissal of the plaintiffs' facial challenge as to the third sentence of Minnesota Statute § 211B.11, subd. 1. I would remand to allow the record to be developed regarding plaintiffs' facial challenge. Otherwise, I concur with the majority's opinion.

Filed Apr. 29, 2011

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Minnesota Majority, Minnesota Voters Alliance, Minnesota North Star Tea Party Patriots, Election Integrity Watch, Susan Jeffers, individually and as an election judge, Dorothy Fleming, Jeff Davis, Dan McGrath and Andy Cilek,

Plaintiffs,

v.

Civil No. 10-4401 (JNE/SER)
ORDER

Joe Mansky in his individual and official capacity as the Elections Manager for Ramsey County, Rachel M. Smith in her individual and official capacity as the Elections Manager for Hennepin County, Mike Freeman in his individual and official capacity as Hennepin County Attorney, Susan Gaertner in her individual capacity, John J. Choi in his official capacity as Ramsey County Attorney, and Mark Richie in his individual and official capacity as Secretary of State,

Defendants.

Individual and institutional Plaintiffs assert violations of the United States and Minnesota constitutions against Defendants, Elections Managers of Ramsey and Hennepin Counties, County Attorneys for Ramsey and Hennepin Counties, and the Minnesota Secretary of State, in their individual and

official capacities.[1] In broad terms, the claims arise out of allegations that Minnesota Statutes section 211B.11, subdivision 1 (2010), which prohibits the wearing of political buttons, badges, and insignia in and around the polling place, is facially unconstitutional and that Defendants, in their implementation and enforcement of the statute, violated Plaintiffs' rights to free speech, association, vote, equal protection, and due process under both the United States and Minnesota constitutions. The case is before the Court on Defendants' motions pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the Amended Complaint. For the reasons set forth below, the Court grants the motions.

I. BACKGROUND

On Monday, November 1, 2010, the Court heard Plaintiffs' motion for a Temporary Restraining Order (TRO) and preliminary injunction. Treating the motion as one for a TRO, the Court found that Plaintiffs were not likely to succeed on the merits of their claims and denied the motion. On November 18, 2010, after the November election took place, Plaintiffs filed the Amended Complaint. The institutional Plaintiffs, Minnesota Majority, Minnesota Voters Alliance, and Minnesota North Star Tea Party Patriots, assert that they are Minnesota

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[1] The Amended Complaint refers to Secretary of State Mark "Richie." The Secretary of State spells his last name "Ritchie" and the Court will refer to him by his correctly spelled name. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the Court substitutes John J. Choi for Susan Gaertner in her official capacity. Choi was sworn in as the Ramsey County Attorney on January 4, 2011.

501(c)(4) nonprofit organizations and that together they form a grass roots coalition called Election Integrity Watch (EIW). The individual Plaintiffs, Susan Jeffers, Jeff Davis, Dorothy Fleming, Dan McGrath, and Andy Cilek, are eligible voters in Ramsey or Hennepin County; Susan Jeffers is also an election judge in Ramsey County.[2] Plaintiffs allege that Minnesota Statutes section 211.B11, subdivision 1, and the way it was enforced, wrongfully prohibited or chilled the wearing of North Star Tea Party Patriots T-shirts and EIW buttons to the polls. The buttons state "Please I.D. Me" and include an image of an open eye, a telephone number, and a website address including the word "integrity." (Am. Compl. Ex. A) The T-shirts bear a "Tea Party Patriots" logo along with one of several slogans including "Don't Tread on Me" and "Fiscal Responsibility, Limited Government, Free Markets." (Am. Compl. Ex. B) The institutional Plaintiffs do not endorse candidates for election and, while the question of whether Minnesota law should be changed to require voters to identify themselves at the polling place is the subject of public

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[2] The Amended Complaint removed two of the original individual Plaintiffs and added Andy Cilek. Otherwise, the parties remain unchanged since the TRO. Though the parties do not dispute the issue of standing, the Court has the obligation to consider the issue independently. Because Cilek has standing on each of the claims in the Amended Complaint, *see St. Paul Area Chamber of Commerce v. Gaertner*, 439 F.3d 481 (8th Cir. 2006), the Court need not consider whether the other Plaintiffs have standing. *See Horne v. Flores*, 129 S. Ct. 2579, 2592-93 (2009); *Clinton v. City of New York*, 524 U.S. 417, 431 n.19 (1998) (finding that because health care appellees have standing it did not matter whether their unions also have standing).

and legislative debate, there was no issue relating to voter identification on the November 2, 2010, ballot.

Minnesota Statutes section 211B.11, subdivision 1 provides:

> A person may not display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100 feet of the building in which a polling place is situated, or anywhere on the public property on which a polling place is situated, on primary or election day to vote for or refrain from voting for a candidate or ballot question. A person may not provide political badges, political buttons, or other political insignia to be worn at or about the polling place on the day of a primary or election. A political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day.

A complaint alleging a violation of section 211B must be filed with the Office of Administrative Hearings (OAH). After OAH has finally disposed of the complaint, the alleged violation can be prosecuted by a county attorney as a petty misdemeanor. Minn. Stat. § 211B.11, subd. 4.

For present purposes, the Court assumes that the allegations of the Amended Complaint, summarized below, are true. Plaintiff and election

judge Sue Jeffers approached Joe Mansky, Elections Manager for Ramsey County, asking about "rumors" she had heard about "Please I.D. Me" buttons and Tea Party T-shirts. Mansky told Jeffers that the buttons and Tea Party messages of any kind would be prohibited at the polls. Subsequently, but prior to November 2, Mansky told election judges that individuals at or "within 100 feet" of the polling place would be asked to cover any "political shirt, hat button, badge or insignia." He also stated that no individual would be denied the right to vote. Rachel Smith, Elections Manager for Hennepin County, and Secretary of State Ritchie subsequently adopted the same policy. The Amended Complaint alleges that this policy applied "particularly" to the "Please I.D. Me" buttons and Tea Party apparel. (Am. Compl. ¶¶ 57-59) Hennepin County Attorney Mike Freeman stated that poll watchers wearing buttons asking voters for identification "won't be allow[ed] in polling stations." (Am. Compl. ¶ 61) On October 30, 2010, Mansky drafted a memorandum on the subject of "Displaying Campaign Materials in the Polling Place" (Election Day Policy).[3] The Election Day Policy directed election judges who saw individuals wearing political materials to remove or cover the materials while "in the polling place." (*Id.*) Under the Election Day Policy

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[3] Each Defendant supplied a different copy of the Election Day Policy but each copy states an identical policy. The versions provided by Hennepin County and the Office of the Secretary of State are dated November 1, 2010. For ease of reference, the Court will refer to the version provided by Ramsey County. (Mansky and Gaertner's Mem. in Supp. Mot. Dismiss, Edison Decl., Ex. A)

> [e]lection judges have the authority to decide what is "political." Examples include, but are not limited to:
>
> - Any item including the name of a political party in Minnesota, such as Republican, DFL, Independence, Green, or Libertarian parties.
>
> - Any item including the name of a candidate at any election.
>
> - Any item in support of or opposition to a ballot question at any election.
>
> - Issue oriented material designed to influence or impact voting (including specifically the "Please I.D. Me" buttons).
>
> - Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on).

Even if individuals refused to remove or cover prohibited items, the Election Day Policy directed that they must be allowed to vote, though their names and addresses would be recorded and referred "to appropriate authorities." (*Id.*)

On election day, Jeff Davis, a registered voter in Ramsey County who had learned of this policy, was deterred from wearing a Tea Party T-shirt and a "Please I.D. Me" button. Dan McGrath, a registered voter in Hennepin County, wore a "Please I.D. Me" button. An election judge asked McGrath to cover the

button, McGrath refused, and the election judge obtained his name. Andy Cilek, also registered to vote in Hennepin County, wore both a "Please I.D. Me" button and a Tea Party T-shirt. Election judges "refused to allow Mr. Cilek to vote" on two occasions. Cilek did not vote "for over five hours."[4] One voter wearing a Tea Party T-shirt was "interrupted" "during the voting process" and asked to remove or cover his Tea Party T-shirt. He was warned that if he did not, he could be prosecuted. Some Hennepin County election judges allowed individuals, including Plaintiff Dorothy Fleming, to wear the "Please I.D. Me" buttons without asking them to cover or remove the buttons. In unidentified counties, unidentified voters were allowed to vote wearing buttons affiliated with the Sierra Club and Minnesota Common Cause. The Sierra Club endorses candidates and Minnesota Common Cause lobbies for legislation to reform the electoral process.[5]

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[4] Mr. Cilek was not, in fact, deprived of the right to vote. (Am. Compl. ¶ 105) At oral argument, Plaintiffs' counsel clarified that all of his clients voted. The "five hours" seems to have been the elapsed time between Mr. Cilek's first and second trips to the polling place. There is no allegation that he was detained or delayed at the polling place.

[5] The Amended Complaint also alleges that "[t]he Defendants admit" that they adopted a policy prohibiting EIW "Please I.D. Me" buttons and Tea Party apparel and that they "did not enforce or otherwise apply a similar policy to other groups." (Am. Compl. ¶ 117) This allegation alone, in the context of the Amended Complaint which is pleaded only against policy-level Defendants, is a "'naked assertion' devoid of 'further factual enhancements'" which does not state a viable claim for relief. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

Aspects of Plaintiffs' Amended Complaint are somewhat imprecise or otherwise difficult to decipher. For example, the Amended Complaint alleges that the policy "exercises a standardless discretion over what expressive conduct is electioneering," when the word "electioneering," while it appears in Arizona's statute, *see Reed v. Purcell*, No. CV 10-2324, 2010 WL 4394289, at *1 (D. Ariz. Nov. 1, 2010); Ariz. Rev. Stat. § 16-515 (2010), does not appear in either the policy or the statute being challenged here. Nonetheless, the Court has determined that Plaintiffs' four-count Amended Complaint alleges: (1) that Minnesota Statutes section 211.B11, subdivision 1, is a facially unconstitutional restriction of First Amendment rights under the United States Constitution and parallel rights under the Minnesota constitution (Count IV); (2) that section 211B.11, as applied in the Election Day Policy adopted by Hennepin and Ramsey Counties and the Secretary of State, violated Plaintiffs' First Amendment rights, their constitutionally protected right to vote, and parallel rights under the Minnesota constitution (Counts I and IV); (3) that the Election Day Policy violated Plaintiffs' due process rights under both the United States and Minnesota constitutions (Count II); and (4) that the Election Day Policy deprived Plaintiffs of equal protection under both the United States and Minnesota constitutions (Count III).[6]

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[6] Plaintiffs repeatedly referenced a claim of retaliation in their memorandum and at oral argument, but the Amended Complaint does not refer to retaliation nor does it allege any facts regarding protected conduct or speech before or during the election which could have been the basis for retaliation. *See Altonen v. City of Minneapolis*, 487 F.3d 554, 559 (8th Cir. 2007).

II. DISCUSSION

When ruling on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim, a court must accept the facts alleged in the complaint as true and grant all reasonable inferences in favor of the plaintiff. *Crooks v. Lynch*, 557 F.3d 846, 848 (8th Cir. 2009). Although a complaint is not required to contain detailed factual allegations, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

A court generally may not consider materials outside the pleadings when deciding a motion to dismiss under Rule 12(b)(6). *Noble Sys. Corp. v. Alorica Cent., LLC*, 543 F.3d 978, 982 (8th Cir. 2008). The court may, however, "consider some public records, materials that do not contradict the complaint, or materials that are 'necessarily embraced by the pleadings.'" *Id.* (quoting *Porous Media Corp. v. Pall Corp.*, 186 F.3d 1077, 1079 (8th Cir. 1999)); *see In re K-tel Int'l, Inc. Sec. Litig.*, 300 F.3d 881, 889 (8th

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The Court finds that Plaintiffs have not pleaded a retaliation claim.

Cir. 2002). The parties rely heavily on the written Election Day Policy in their memoranda and at oral argument, and they do not dispute the contents or authenticity of the document. Though the Election Day Policy was not attached to the pleadings, and the Amended Complaint makes reference to previously issued verbal iterations of the policy, no party has argued that consideration of the document will convert the motion to dismiss to a motion for summary judgment. At oral argument Plaintiffs clarified that it is their intent to "[i]n the very first instance, challenge this written policy with the State of Minnesota." Accordingly, the Court considers the Election Day Policy to be necessarily embraced by the pleadings and considers this to be the policy under attack in Plaintiffs' Amended Complaint. *See BJC Health Sys. v. Columbia Cas. Co.*, 348 F.3d 685 (8th Cir. 2003); *Porous Media Corp.*, 186 F.3d at 1079; *Silver v. H & R Block, Inc.*, 105 F.3d 394, 397 (8th Cir. 1997); *see also Pegram v. Herdrich*, 530 U.S. 211, 230 n.10 (2000). Additional documents were submitted by the parties but they are outside of the pleadings and thus are not considered in deciding the Rule 12(b)(6) motions. *See* Fed. R. Civ. P. 12(d).

A. Counts I and IV: The Constitutionality of Minnesota Statutes Section 211B.11

1. Facial Challenge

The Amended Complaint claims that Minnesota Statutes section 211B.11 is facially unconstitutional under both the United States and Minnesota constitutions. (Am. Compl. ¶ 1) Minnesota's guarantees of freedom of speech are

coextensive with those of the federal constitution and these claims are examined under the same standard. *See State v. Wiklund*, 589 N.W.2d 793, 798-801 (Minn. 1999). The statute is a content-based regulation because it only prohibits badges, buttons, and insignia with a political message. *See Burson v. Freeman*, 504 U.S. 191, 197 (1992). Political speech "is at the heart of the protections of the First Amendment." *281 Care Committee v. Arneson*, No. 10-1558, slip op. at 19, n.3 (8th Cir. Apr. 28, 2011). Indeed, the protections afforded to political speech under the First Amendment are "difficult to overstate." *Id.* at 19 n.3 (citing *Snyder v. Phelps*, 131 S. Ct. 1207 (2011); *Citizens United v. FEC*, 130 S. Ct. 876 (2010)). The level of scrutiny that the Court must use to evaluate the constitutionality of the restrictions in section 211B.11, subdivision 1, depends upon the forum in which the restrictions take place. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800-02 (1985). Traditional public fora include public streets, parks, and places that by either tradition or "government fiat have been devoted to assembly or debate." *Id.* In public fora, content-based restrictions are subject to strict scrutiny, i.e., they are prohibited unless necessary to serve a compelling state interest and narrowly tailored to achieve that interest. *Id.* Restrictions on speech in nonpublic fora are allowed as long as they are viewpoint neutral and reasonable in light of the purposes served by the forum. *Id.*

The Court will begin by assessing the first clause of section 211B.11, subdivision 1. It states that a person may not "display campaign material, post signs, ask, solicit, or in any manner try to induce or persuade a voter within a polling place or within 100

feet" of polling locations. In *Burson v. Freeman*, the Supreme Court found that a substantively identical Tennessee law was constitutional. 504 U.S. at 193. The Tennessee law examined in *Burson* prohibited "the display of campaign posters, signs or other campaign materials, distribution of campaign materials, and solicitation of votes for or against any person or political party or position on a question" within 100 feet of a polling place. *Id.* The *Burson* Court ruled that the law survived strict scrutiny as a "facially content-based restriction on political speech in a public forum." *Id.* at 198. There is no meaningful distinction between the Tennessee law and the first clause of section 211B.11.

The second part of section 211B.11, subdivision 1, restricts "political" material rather than "campaign" material and is geographically more limited because it applies only "at or about the polling place." The briefing and argument in this case take for granted that the second clause of the statute applies only at the polling place and does not extend to the 100 foot area outside the polling place regulated by the first clause of section 211B.11; this comports with the Court's reading of the statute. As such, the Court's analysis of the second clause applies to the polling place itself, not its surroundings. The *Burson* Court examined the polling place and the area within 100 feet of the polling place and concluded that the area was "a quintessential public forum." *Cf. id.* at 214 (Scalia, J., concurring) (expressing the view that the area outside of the polling place is a non-public forum subject only to the reasonableness test). *Burson* does not control what level of scrutiny applies to restrictions on speech that apply only "at or about" the

polling place. At oral argument, the parties agreed that the polling place is a nonpublic forum and every federal circuit and district court that has addressed this issue has concluded the same. *See, e.g.*, *United Food & Commercial Workers Local 1099 v. City of Sidney*, 364 F.3d 738, 749-50 (6th Cir. 2004); *Marlin v. D.C. Bd. of Elections & Ethics*, 236 F.3d 716 (D.C. Cir. 2001); *Am. Fed. of State, Cnty. and Mun. Emps., Council 25 v. Land*, 583 F. Supp. 2d 840, 848-49 (E.D. Mich. 2008); *Cotz v. Mastroeni*, 476 F. Supp. 2d 332, 364-65 (S.D.N.Y. 2007).[7] Section 211B.11's restrictions on speech "at or about the polling place" need only be viewpoint neutral and reasonable in light of the purpose served by the forum. *Cornelius*, 473 U.S. at 806 ("The Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation.").

Section 211B.11, on its face, is viewpoint neutral. It applies to any political badge or button, no matter what view it espouses. *See id.* at 811-12 ("[A] decision to exclude all advocacy groups, regardless of political or philosophical orientation, is by definition viewpoint neutral."). Section 211B.11 is also reasonably related to the legitimate state interest of "maintain[ing] peace, order, and decorum," *Mills v. Alabama*, 384 U.S. 214, 218 (1966), at polling places. *See Marlin*, 236 F.3d at 719-20 ("Because the Board's

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[7] At oral argument, Plaintiff's counsel argued that any content-based restrictions on speech must meet "exacting scrutiny" regardless of the forum, citing *Burson*. *Burson* does not stand for this proposition. As explained above, *Burson* applied strict scrutiny to an area defined as a *public* forum.

enforcement of [regulations barring political paraphernalia] to regulate political activity inside polling places is 'reasonable in light of the purpose for which the forum at issue serves,' given the history and function of polling places, we hold that the regulations do not violate the First Amendment." (citations omitted)); *cf. Burdick v. Takushi*, 504 U.S. 428, 438 (1992) ("[T]he function of the election process is to winnow out and finally reject all but the chosen candidates, not to provide a means of giving vent to short-range political goals, pique, or personal quarrel[s]." (citations and quotation marks omitted)); *Berner v. Delahanty*, 129 F.3d 20, 26-27 (1st Cir. 1997) (upholding ban on "political-advocacy buttons" in Maine superior court because the "courthouse is a place in which rational reflection and disinterested judgment will not be disrupted").

2. As-Applied Challenge

Plaintiffs next challenge section 211B.11 as it is applied by Defendants' Election Day Policy. Plaintiffs challenge the policy on the basis that it is not viewpoint neutral and that it is not narrowly tailored to achieve a compelling state interest. The Court has already explained that the Election Day Policy need not be narrowly tailored to achieve a compelling state interest because it restricts speech only in the polling place, a nonpublic forum. Plaintiffs argue that the Election Day Policy is not viewpoint neutral because it singles out their political paraphernalia and organizations. The Election Day Policy lists the "Please I.D. Me" buttons as an example of material "specifically" "include[ed]" in the category of "issue oriented material." The Tea Party is listed

alongside Moveon.org as an example of a group with "recognizable political views" whose promotional materials are not allowed. The inclusion of illustrative examples does not alter the viewpoint neutrality of the policy. The Election Day Policy applies to badges, buttons, and insignia expressing all manner of political views. The fact that the Election Day Policy was promulgated following Plaintiff Susan Jeffers asking about "rumors" she had heard about the buttons and T-shirts does not support a finding that the Election Day Policy is not viewpoint neutral. *See Hill v. Colorado*, 530 U.S. 703, 724-25 (2000) ("[T]he contention that a statute is 'viewpoint based' simply because its enactment was motivated by the conduct of partisans on one side of a debate is without support."). Neither is it determinative that the restrictions are content-based. "Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983); *see also Families Achieving Independence and Respect v. Neb. Dep't of Soc. Servs.* (*FAIR*), 111 F.3d 1408, 1422 (8th Cir. 1997) (distinguishing based on message content is not viewpoint discrimination).

Because the polling place is a nonpublic forum, the Election Day Policy need only be reasonably related to the state's legitimate interests. The state has a well-established, legitimate interest in providing a safe, orderly, advocacy-free polling place.

See Mills, 384 U.S. at 218; *accord Burson*, 504 U.S. at 211 (describing the history and importance of ballot secrecy and noting that all 50 states limit access to the areas in and around the polling place). The Election Day Policy, like the statute, covers all political badges, buttons, or insignia. Plaintiffs' argument that the buttons and T-shirts in question are not political is unavailing. In fact, as the Court considers this case, there is a proposed legislation that would require voter identification pending in the Minnesota House of Representatives.[8] The Amended Complaint states that the "Please I.D. Me" buttons were created by EIW, a "grass roots effort to protect election integrity," "in preparation for the November 2010 Election." EIW "disseminated its buttons and instructed its separate organizational members and supporters" to wear the buttons in their polling places on election day. The language on the button intimates that government-issued identification should be—or is—required in order to vote in Minnesota. This intimation could confuse voters and election officials and cause voters to refrain from voting because of increased delays or the misapprehension that identification is required. On this basis alone, the Court concludes that it was reasonable to ban the "Please I.D. Me" buttons. *Cf.*

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[8] *See* H. Research, Minn. H.R., 87th Sess., Bill Summary of H.F. No. 89, third engrossment, (Apr. 19, 2011); H. Research, Minn. H.R., 87th Sess., Bill Summary of H.F. No. 210, third engrossment, (Apr. 14, 2011). The Court considers this proposed legislation to be a part of the public record. *See Friends of Lake View Sch. Dist. Inc. No. 25 of Phillips Cnty. v. Beebe*, 578 F.3d 753, 762 n.12 (8th Cir. 2009); *Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004) (taking judicial notice of publically available voting-age population statistics taken from Virginia Division of Legislative Services website on a motion to dismiss pursuant to 12(b)(6)).

Minn. Stat. § 204C.035, subd. 1 (2010) (providing criminal penalty for knowingly deceiving another individual regarding time, place, or manner of conducting an election, or the qualifications of voter eligibility for an election with the intent to prevent the individual from voting); *Burson*, 504 U.S. at 199 ("[A] State has a compelling interest in protecting voters from confusion and undue influence." (citing *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 228-229 (1989))); *Berner*, 129 F.3d at 27 ("[The] mere wearing of a pin that advocates a position regarding a hotly contested political issue raises the specter of politicization and partiality."). In an organized effort such as this one, the buttons also identify a group of like-minded individuals, announcing their views and presence to others, increasing the potential for polarization, disruption, and intimidation at the polls.

Likewise, the Tea Party apparel communicates support for the Tea Party movement which is associated with particular views on matters of public governance. The Amended Complaint describes the North Star Tea Party Patriots as "a coalition of local associations in Minnesota with a mission to attract, educate, organize, and mobilize citizens to secure public policies consistent with values inclusive of fiscal responsibility, constitutionally limited government and free markets." (Am. Compl. ¶ 9) The Amended Complaint acknowledges that the Tea Party apparel at issue "reflect[s] the[se] values." (Am Compl. ¶ 45) In July 2010 the U.S. House of Representatives recognized a Tea Party caucus consisting entirely of Republican members of Congress. Mobilizing public opinion on matters of fiscal or electoral policy, or on the proper reach of government, like persuading and

organizing elected representation, is "political" activity by any fair estimation. Whether a group endorses candidates for public office is not the litmus test for whether it is a "political" organization. Such a pinched definition of politics would be inconsistent with the fundamental premise of American democracy: the power to govern, on any number of matters that come to be of general concern, belongs to the people. The vigorous debate about those matters is political, whether or not it finds expression in a registered political party as defined by the Minnesota Statutes. *See* Minn. Stat. § 200.02, subd. 6 (2010). The Court concludes that prohibiting apparel that expresses support for a political ideology is reasonably related to the legitimate state interest of "maintain[ing] peace, order, and decorum" at the polls. *Mills*, 384 U.S. at 218; *accord Burson*, 504 U.S. at 211 ("The Court . . . has recognized that a State indisputably has a compelling interest in preserving the integrity of its election process." (quotation marks omitted)); *see also* Minn. Stat. § 204C.08, subd. 1d (2010) (voters in Minnesota "have the right to vote without anyone in the polling place trying to influence [their] vote"). Given the statements made by the apparel and buttons, and the singular purpose of the polling place, it is inconsequential that the institutional Plaintiffs are not political parties, that the institutional Plaintiffs do not endorse political candidates, and that there was no ballot measure on voter identification on the November 2, 2010, ballot. The Court finds section 211B.11 constitutional as applied.

3. Vagueness Challenges

Plaintiffs challenge the constitutionality of section 211B.11 and the Election Day Policy based on vagueness. It is not entirely clear whether the parties believe that the issue of vagueness is the subject of the Amended Complaint. Defendant Ritchie devotes one paragraph and cites one case dealing with the issue in his reply to Plaintiffs' memorandum, as do the Hennepin County Defendants. The Ramsey County Defendants make no mention of the vagueness doctrine in either of their submissions to the Court. Plaintiffs' memorandum cites no cases on this point, though they do make a strenuous argument based on the lack of standards in the Election Day Policy and the statute's lack of a definition for the word political. Given this general lack of briefing, the most reasonable conclusion is that the Amended Complaint does not allege that Minnesota Statutes section 211B.11 is void for vagueness. Nevertheless, a vagueness challenge would not alter the Court's conclusion with respect to Defendants' motions for dismissal.

"The void-for-vagueness doctrine is embodied in the due process clauses of the fifth and fourteenth amendments." *Woodis v. Westark Cmty. Coll.*, 160 F.3d 435, 438 (8th Cir. 1998). A vague regulation violates the Constitution if it fails (1) to define the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and (2) to establish standards to permit enforcement of the law in a non-arbitrary, non-discriminatory manner. *Id.* "In a facial vagueness challenge, an enactment reaching a substantial amount of constitutionally

protected conduct may withstand constitutional scrutiny only if it incorporates a high level of definiteness. An enactment imposing criminal sanctions or implicating constitutionally protected rights demands more definiteness than one which regulates the economic behavior of businesses." *Id.* In the First Amendment context, there is the added concern that a vague statute will create a chilling effect because "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972). Unless a statute's vagueness poses a real and substantial threat to protected expression, it will not be struck down as vague. *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 59-60 (1976). In assessing vagueness, "we are relegated . . . to the words of the ordinance itself, to the interpretations the court below has given to analogous statutes, and perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it." *Grayned*, 408 U.S. at 110.

a. Vagueness of Statute

Count IV alleges that "the word 'political' as seen in the context of the facts of this case is facially constitutionally invalid." (Am. Compl. ¶ 129) Plaintiffs conflate the concept of an as-applied challenge with a facial challenge; a facial attack on a statute does not depend on the application of a specific set of facts to the language of the statute. *See Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 133 n.10 (1992). Nevertheless, the Court reads the complaint

liberally and interprets this as a facial vagueness challenge to the statute.[9]

When examining whether a statute provides constitutionally sufficient notice, the relevant inquiry is whether the language "provides fair warning of the conduct that is prohibited" to a "person of ordinary intelligence." *Venkelese v. City of Fargo*, 248 F.3d 738, 747 (8th Cir. 2001); *CSC v. Letter Carriers*, 413 U.S. 548, 578-79 (1973). Section 211B.11 does not include a definition of political. Defendants argue that the definition of political is plain and unambiguous, even without an explicit statutory definition. *See Merriam-Webster's Collegiate Dictionary* 899 (10th ed. 2001) (defining "political" as "of or relating to government, or the conduct of government" and "of, relating to, involving, or involved in politics and esp. party politics"). In response, Plaintiffs cite several dictionary definitions of the word "political" and assert that the term is ambiguous. (Pls.' Mem. Resp. at 15 ("[O]f or concerning government, or political affairs generally"; "of, pertaining to, or concerned with politics . . . of, pertaining to, or connected with a

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[9] Although not raised by either party, the Court is not without doubt as to whether Plaintiffs can mount a facial vagueness challenge when their conduct appears to have been clearly proscribed by the statute. *See Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2719 (2010) ("[E]ven to the extent a heightened vagueness standard applies, a plaintiff whose speech is clearly proscribed cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice."). Perhaps Plaintiffs' failure to seriously brief this issue, especially as to notice, is an acknowledgment that they do not have standing to bring a facial challenge based on vagueness. However, because the issue has not been raised or briefed, the Court will address the merits of the claim.

political party"; "pertaining to politics; of or relating to the conduct of government")). These definitions, which are substantially similar, comport with the common understanding of the word political. The Court finds that the word "political" is not vague. *Cf. McConnell v. FEC*, 540 U.S. 93, 241 (2003) (phrase "political matter of national importance" not unconstitutionally vague), overruled on other grounds by *Citizens United*, 130 S. Ct. 876; *Bryant v. Gates*, 532 F.3d 888, 893 (D.C. Cir. 2008) (rejecting vagueness challenge to ban on "political" advertisements); *see also FAIR*, 111 F.3d at 1415-16 (rejecting vagueness challenge to unwritten ban on "advocacy groups," defined to include "'political' groups," in nonpublic forum); *State v. Schirmer*, 646 So. 2d 890, 902 (La. 1995) (reading *Burson* to approve a "comprehensive restriction" "upon all political speech" within 100 feet of polling places).[10] That the word "political" can be applied in various circumstances, some of which necessarily depend upon what issues are currently "involved in politics" or being discussed in relation to issues of governance, does not make its meaning unclear. Further, that the statute regulates the polling place—

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[10] That the Minnesota Supreme Court has construed "political committee" and "political fund" narrowly to avoid vagueness and overbreadth concerns in the context of campaign finance disclosure requirements, *see Minn. Citizens Concerned for Life, Inc. v. Kelley*, 698 N.W.2d 424 (Minn. 2005), does not control the Court's analysis. *Kelley* focused on a statute modeled directly on one previously interpreted by the United States Supreme Court as requiring a narrowing construction to avoid vagueness in *Buckley v. Valeo*, 424 U.S. 1, 77-80 (1976) (narrowly construing requirement that "political committees" and all others making expenditures "to influence the nomination or election of a candidate"). Both *Buckley* and *Kelley* are inapposite because campaign finance involves a public, not a nonpublic, forum.

historically a place of neutrality meant to provide a space "as free from interference as possible"—further supports a finding that the ban on "political" material is easily understood to include issues beyond those directly applicable to the ballot. *Burson*, 504 U.S. at 211; *see also Boos v. Barry*, 485 U.S. 312, 332 (1988) (interpreting undefined terms in statute based on given context for which statute is crafted); *Grayned*, 408 U.S. at 108 (same).

That the statute provides discretion to individual election judges is not by itself constitutionally fatal. *See Ridley v. Mass. Bay Trans. Auth.*, 390 F.3d 65, 93 (1st Cir. 2004) ("The mere fact that a regulation requires interpretation does not make it vague." (citations omitted)). Election judges will surely have to use discretion to determine whether a given expression is political, but "enforcement of all laws involves some discretion." *Venkelese*, 248 F.3d at 747 (citation omitted). Further, "[e]xcessive discretion and vagueness inquiries under the First Amendment are not static inquiries, impervious to context." *Ridley*, 390 F.3d at 94-95 (citations omitted). "[A] grant of discretion to exercise judgment in a non-public forum must be upheld so long as it is 'reasonable in light of the characteristic nature and function' of that forum." *Id.* at 95; *see also Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1323-24 (Fed. Cir. 2002) (concluding that greater latitude ought to be afforded to officials in nonpublic fora because "'selectivity' and 'discretionary access' are defining characteristics of non-public fora, which unlike public fora are not intended to be open to all such speech"). Indeed, if election officials had not caught wind of the organized effort here, election

judge discretion would have been the last bulwark between the "Please I.D. Me" buttons and the polling place. The Court concludes that the discretion inherent in the statute is reasonable to ensure that Minnesota is able to maintain a neutral zone where voters will not be disturbed by ad hoc, of-the-moment campaigns or other movements at the polls which might disrupt or inappropriately influence voters but which may not be foreseen by the legislature.

Moreover, because the polling place is a nonpublic forum created for the limited purpose of exercising voting rights, the risk that constitutionally protected speech there will be chilled is small. "The only expressive activity involved [in the polling place] is each voter's communication of his own elective choice and this has long been carried out privately—by secret ballot in a restricted space." *Marlin*, 236 F.3d at 719 ("[T]he interior of a polling place . . . is not available for general public discourse of any sort."); *see Cal. Teachers Ass'n v. Bd. of Educ.*, 271 F.3d 1141, 1152 (9th Cir. 2001) ("The touchstone of a facial vagueness challenge in the First Amendment context . . . is not whether some amount of legitimate speech will be chilled; it is whether a substantial amount of legitimate speech will be chilled."); *accord Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989); *cf. Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (finding no First or Fourteenth Amendment violations where city prohibits "political or public issue advertising" on city public rapid transit system because "[n]o First Amendment forum is here to be found").

b. Vagueness and Standardless Discretion in the Election Day Policy

Plaintiffs also appear to claim that the Election Day Policy is vague. (Am. Compl. ¶ 131) In their brief, Plaintiffs challenge the word "political," and the phrases "recognizable political views" and "issue oriented material designed to influence or impact voting." The Election Day Policy identifies five specific categories of materials as "political." The Policy refers to the Tea Party and Moveon.org as examples of organizations with "recognizable political views." "Please I.D. Me" buttons were also specifically referred to in the Election Day Policy. These examples serve to further clarify—not confuse—the meaning of the word political for individuals reading the policy. Indeed, "[t]o the extent these terms are unclear when read in isolation, they find clarity when read in context with the entire [policy]—the [policy] provides clear limiting examples illustrating the meaning of these terms." *Hunt*, 2011 WL 982475, at *8 (examining context to clarify terms "inherently communicative" and "nominal utility apart from its communication"); *see Griffin*, 288 F.3d at 1330 ("Challenged terms must be read in context of the regulation as a whole."). Persons of ordinary intelligence can conclude that if they wear apparel that can reasonably be understood to express a political statement they may be asked to cover or remove the item while at the polls. Thus, the Election Day Policy provides fair warning of the types of badges, buttons, and insignia that are prohibited while voting.

The Plaintiffs argue the Election Day Policy allowed "arbitrary and standardless" enforcement. This issue arises both as part of Plaintiffs' vagueness challenge and in their separate due process claim that the Election Day Policy "exercises a standardless discretion." The Court addresses these claims together because, though "[t]he void-for-vagueness doctrine and the excessive delegation doctrine are technically 'analytically distinct,'" the two claims overlap here. *See Ridley*, 390 F.3d at 94; *see also Bryant*, 532 F.3d at 894 n.1. Plaintiffs cite cases that stand for the proposition that licensing systems "which vest in an administrative official discretion to grant or withhold a permit based upon broad criteria unrelated to proper regulation of public places" are consistently condemned. *Shuttlesworth v. Alabama*, 394 U.S. 147, 153 (1969). Section 211B.11 is not a licensing system allowing the regulation of speech in a public forum. *See Ridley*, 390 F.3d at 94-95 (distinguishing cases that "deal with licensing schemes regulating the exercise of speech in traditional public fora" from a regulatory scheme that is not a licensing scheme and "is neither a traditional nor designated public forum" (citation omitted)); *see also Griffin*, 288 F.3d 1321 ("All of the modern cases in which the Supreme Court has set forth the unbridled discretion doctrine have involved public fora, and no Supreme Court case has suggested that the doctrine is applicable outside of a public forum."). "[W]hile the fact that the government may constitutionally impose content-based restrictions on speech in nonpublic fora does not insulate a regulation from an unbridled discretion challenge," a restriction within the polling place does not pose the same threats to expression as a licensing scheme in a public forum. *See Griffin*, 288 F.3d at

1322-24 (upholding restriction on expression on Department of Veterans Affairs property and distinguishing it from licensing schemes that restrict newspapers or other media in the public forum (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 764 (1988))). As such, the licensing cases cited by Plaintiffs are not especially germane to Plaintiffs' challenge to the policy. Given the purpose and history of the polling place, it is reasonable that election judges be given discretion to determine what is political. There exists the potential for innumerable issues to become political, though they may not ordinarily be considered so, because of an on-going national debate, local controversy, or relevance to an issue or candidate on the ballot.[11] *See Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1314 (Fed. Cir. 2008) (rejecting First Amendment unbridled discretion challenge to ban on "demonstrations" at VA Medical Centers in light of need "to maintain a place of healing and rehabilitation for veterans"); *Griffin*, 288 F.3d at 1324-25 (finding discretion reasonable to

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[11] To the extent Plaintiffs have argued that the Election Day Policy is an unconstitutional prior restraint, the Court finds that the statute is "not a prior restraint, but a restriction on otherwise protected speech: 'A frequent pitfall of both courts and commentators is to employ the doctrine [of prior restraint] in cases involving expression clearly within the first amendment guarantees, in ignorance of the fact that [w]here the speech in question is in all events guaranteed by the First Amendment, attributing that guarantee to the circumstance of prior restraint is at best irrelevant and often misleading.'" *Van Bergen v. Minnesota*, 59 F.3d 1541, 1551 n.6 (8th Cir. 1995) (quoting Lawrence H. Tribe, *American Constitutional Law* 1041 (1988)). Further, Plaintiffs are not prevented from expressing their message; they are prohibited from expressing it within the narrow area of the polling place. *Cf. Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 764 n.2 (1994).

ensure the preservation of the commemorative functions of national cemeteries even where such decisions "may defy objective description and . . . vary with individual circumstances"). Further, while it is unconstitutional to enable a public official to determine which viewpoints will be permitted and which will not, *see Lewis v. Wilson*, 253 F.3d 1077, 1079-80 (8th Cir. 2001), the Election Day Policy does not allow expression of any political viewpoints. This is not a case where regulations require a speaker to receive permission to engage in speech or which permits communication in a certain manner for some but not for others; all political expressions, regardless of the view, are prohibited in the polling place.

4. Overbreadth of the Policy

The Court now turns to Plaintiffs' claim that the Election Day Policy is overbroad. Plaintiffs' overbreadth claim is based on their belief that the word "political" is "so broad it is overinclusive." (Pls.' Mem. Resp. at 14) To be unconstitutional, overbreadth "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Venkelese*, 248 F.3d at 747 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). Where, as here, a plaintiff's overbreadth claim is based on the same factual allegations as those underpinning their as-applied challenge to a statute, review for overbreadth is inappropriate. *See, e.g., United States v. Kistner*, 68 F.3d 218, 220 n.5 (8th Cir. 1995) (citing *Van Bergen*, 59 F.3d at 1549-50) (no review for overbreadth where no significant difference between plaintiff's claim that the policy statement is unconstitutional as applied to

his particular activities and his claim that the policy statement is invalid for overbreadth).

Even if review for overbreadth were appropriate, the Election Day Policy is not overbroad. "A successful overbreadth claim must show that a challenged statute will 'compromise recognized First Amendment protections of parties not before the Court' who engage in 'conduct more likely to be protected by the First Amendment than [plaintiff's] own [conduct].'" *Ways v. City of Lincoln*, 274 F.3d 514, 518 (8th Cir. 2001) (citing *City Council v. Taxpayers for Vincent*, 466 U.S. 801, 802 (1984)). Plaintiffs here specifically object that the Election Day Policy "restrict[s] a person from wearing an ideological statement in the polling place when the statement does not endorse a candidate or ballot question," and, in so doing, covers too broad a swath of expression. (Pls.' Mem. Resp. 17) As previously explained, such an ideological statement, if it is political as understood by the common sense definition of the word, is reasonably prohibited from the polling place. The impact of the Election Day Policy on the conduct of other speakers will not differ from its impact on the Plaintiffs. Like the individual Plaintiffs, other individuals wearing clothing or buttons expressing political ideology or beliefs, even those unrelated to a candidate or ballot question, will fall within the policy's legitimate sweep. *See Hill*, 530 U.S. at 731 (reasoning that comprehensiveness of statute was virtue rather than vice); *see also Marlin*, 236 F.3d at 720 ("That narrower regulations might be as effective or more so . . . does not invalidate the means the District has chosen."). Because of the special interests at stake in the polling place—a nonpublic forum—this case is distinct from

others that have analyzed similar language for overbreadth in public fora. *Cf. Anderson v. Spear*, 356 F.3d 651, 663-65 (6th Cir. 2004) (finding prohibition on "electioneering," defined to include speech instructing voters on how to cast absentee ballots and speech "remind[ing] voters to fill in the ovals completely," within 600-feet of polling place is overbroad); *Bauers v. Cornett*, 856 F.2d 1517, 1525-26 (8th Cir. 1989) (narrowly construing state law prohibiting state employees from soliciting financial assistance "for any political party, candidate, political fund, or publication, or any other political purposes").

5. Deprivation of Voting Rights

Plaintiffs allege that Cilek was deprived of the right to vote the first time he went to his polling place. Defendants counter that Plaintiffs have pleaded no facts connecting the individual Defendants with the violation of individual rights and so they cannot be liable for Cilek's alleged voting rights deprivation. "[A] municipality cannot be held liable solely for the acts of others, e.g., solely because it employs a tortfeasor" "[b]ut the municipality may be held liable when execution of a government's policy or custom . . . inflicts the injury." *Los Angeles Cnty. v. Humphries*, 131 S. Ct. 447, 452 (2010); *Parrish v. Ball*, 594 F.3d 993, 997 (8th Cir. 2010) (plaintiffs must plead facts that plausibly show that Defendants or the "county 'itself caused the constitutional violation at issue'"). "To establish personal liability of the supervisory defendants, [plaintiff] must allege specific facts of personal involvement in, or direct responsibility for, a deprivation of his constitutional rights." *Mayorga v. Missouri*, 442 F.3d 1128, 1132 (8th Cir. 2006). Because

the Plaintiffs have not pleaded any facts connecting Defendants with the alleged actions against Cilek, and because the Election Day Policy mandates that all individuals be allowed to vote regardless of their compliance with the policy, Plaintiffs have failed to plead that these Defendants unconstitutionally hindered Cilek's right to vote.

6. Failure to Train

Plaintiffs also allege that Defendants did not adequately educate, train, and instruct election judges and poll workers in a manner to avoid "intentional, reckless, or callous indifference" to Plaintiffs' free speech, association, and voting rights. Defendants, in turn, argue that this claim is inadequately pleaded. Government officials are liable in their official capacity under 42 U.S.C. § 1983 for failure to adequately train their employees where training practices are inadequate; the government entity was deliberately indifferent to the rights of others in adopting the training practices; and an alleged deficiency in the training procedures actually caused the plaintiff's injuries. *Parrish*, 594 F.2d at 997. Accordingly, for the Defendants to be liable for failure to train and supervise, Defendants' alleged failure to train must have caused a deprivation of constitutional rights. *Tlamka v. Serrell*, 244 F.3d 628, 635 (8th Cir. 2001) (citing *Andrews v. Fowler*, 98 F.3d 1069, 1078 (8th Cir. 1996)). Consistent with the Court's determination that Plaintiffs have not pleaded any violations of their rights to free speech or association, the Court finds Plaintiffs have not pleaded a failure to train claim based on those alleged violations.

As for the right to vote, the Election Day Policy and the Amended Complaint make clear that Mansky specifically instructed election judges that "no person should be turned away from voting even if that person failed to cover up his or her 'political shirt, hat, button, badge, or insignia' particularly those wearing 'Please I.D. Me' buttons or Tea Party Patriots clothing." (Am. Compl. ¶ 59) Given this policy, there is no set of facts which could plausibly show that "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that [Defendants] can reasonably be said to have been deliberately indifferent to the need." *Ambrose v. Young*, 474 F.3d 1070, 1079-80 (8th Cir. 2007) (quotation omitted). Plaintiffs have not pleaded facts that plausibly show improper training by Defendants related to their right to vote.

B. Count II: Due Process Claims

Plaintiffs' due process claim focuses specifically on Defendants' implementation of the Election Day Policy.[12] Pleading a substantive due process violation requires alleging actions that violate one or more fundamental constitutional right and were shocking to the "contemporary conscience." *C.N. v. Willmar Pub. Schs., Indep. Sch. Dist. No. 347*, 591 F.3d 624 (8th Cir. 2010). Defendants assert that Plaintiffs' due process claims should be dismissed because they

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[12] The parties agree that Plaintiffs' Minnesota due process claim should be treated identically to their federal claim "because the due process protection provided under the Minnesota Constitution is identical to that which is provided by the federal constitution." *Sartori v. Harnschfeger Corp.*, 432 N.W.2d 442, 453 (Minn. 1988).

"overlap fully" with their First Amendment claims and are thus subsumed by those claims. *See Koutnik v. Brown*, 456 F.3d 777, 781 n.2 (7th Cir. 2006); *Edwards v. City of Goldsboro*, 178 F.3d 231, 248 n.11 (4th Cir. 1999); *see generally Albright v. Oliver*, 510 U.S. 266, 273 (1994) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims."). A review of the Amended Complaint reveals that Plaintiffs' due process claims, with the exception of the one allegation related to voting rights, overlap fully with their First Amendment claims. Plaintiffs do not dispute this and the Court proceeds accordingly.

Plaintiffs allege that the Election Day Policy violated their due process rights by interfering with their right to vote. The only facts in the Amended Complaint that support such an allegation are those regarding Cilek's alleged voting deprivation and, potentially, the unidentified voter who was "interrupted" while voting. The right to vote is a fundamental right and thus, if a policy infringes on the right it must meet strict scrutiny. *See, e.g., Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 626 (1969). The Election Day Policy requires that all individuals be allowed to vote, whether or not they are compliant with a request to remove political material—the Election Day Policy does not infringe on the right to vote and is thus not subject to strict scrutiny. Insofar as this claim is based on the enforcement of the Election Day Policy, the Court has explained that the policy-level Defendants against whom this action is

brought cannot be held liable for violations of constitutional rights unless their actions, or the government's policy or custom, were the moving force behind the violation. Count II is dismissed.

C. Count III: Equal Protection Claim

Plaintiffs plead (1) that Defendants adopted a policy to intentionally discriminate against the Plaintiffs; and (2) that the standardless discretion allowed by the policy resulted in inconsistent enforcement. Defendants argue that Plaintiffs' state and federal equal protection claims must fail because they have not shown that the Election Day Policy treated them differently than similarly situated people. Under both Minnesota and federal law, the government is required to treat similarly situated people the same. *See Ganley v. Minneapolis Park & Recreation Bd.*, 491 F.3d 743, 747 (8th Cir. 2007); *Beaulieu v. Mack*, 788 N.W.2d 892, 898 (Minn. 2010).

Plaintiffs argue that they have made a "class of one" equal protection claim. The purpose of a class-of-one equal protection claim is "to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). Plaintiffs may prevail on a class-of-one claim by showing that they have been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Id.*

Even assuming that the individual and institutional Plaintiffs were treated differently because of their association with one of the Plaintiff organizations, Plaintiffs have not alleged facts that plausibly support a finding that enforcement of the Election Day Policy discriminated against Plaintiffs or caused Plaintiffs' injuries. As explained above, the Election Day Policy is viewpoint neutral. The Election Day Policy treats similar individuals and groups similarly; the only difference with respect to the institutional Plaintiffs and other political organizations (such as Common Cause or the Sierra Club) is that the Tea Party and the "Please I.D. Me" buttons are mentioned explicitly by name. Moveon.org is also mentioned by name in the policy, as are most of the major political parties. Moreover, Plaintiffs have acknowledged that the coalition EIW was formed "in preparation for the 2010 election" as a "grass roots effort to protect election integrity." After its formation, EIW created and disseminated the "Please I.D. Me" buttons to its members to wear on election day and, subsequently, Plaintiff Sue Jeffers approached Ramsey County Elections Manager Joe Mansky about the buttons. It was reasonable for Defendants to respond to this organized effort by educating election judges and issuing the Election Day Policy. *Id.*; *Costello v. Mitchell Pub. Sch. Dist.* 79, 266 F.3d 916, 921 (8th Cir. 2001); *cf. United States v. Catlett*, 584 F.2d 864, 867 (8th Cir. 1978) ("While the decision to prosecute an individual cannot be made in retaliation for his exercise of his first amendment right to protest government war and tax policies, the prosecution of those protestors who publicly and with attendant publicity assert an alleged personal privilege not to pay taxes as part of their protest is not selection on an

impermissible basis."). Having been informed of an organized movement that had the potential to disrupt polling places, election officials were under no requirement to sit on their hands and refrain from giving guidance to workers at the polls.

The alleged inconsistent enforcement of the Election Day Policy—allowing some individuals to vote wearing Common Cause or the Sierra Club buttons but asking some of the individual Plaintiffs to cover their Tea Party Patriot T-shirts or EIW buttons—does not state an equal protection claim against the Defendants who wrote and promulgated the policy. For the same reasons that Defendants are not liable for Cilek's alleged voting rights deprivation, they are not liable for any inconsistent enforcement of the Election Day Policy. Plaintiffs have not adequately alleged an equal protection violation against Defendants.

In their response, Plaintiffs argue that they have alleged that Defendants failed to adequately train election judges and poll workers. The Amended Complaint states, under Count I, that election judges and poll workers were not properly educated "in a manner to avoid the threatened intentional, reckless, or callous indifference to the Plaintiffs' federally protected rights of freedom of speech and association, and the right to vote." The Amended Complaint does not state that the failure to train caused intentional discrimination by poll workers such that their equal protection rights were violated. Plaintiffs have failed to allege that the deprivation of their equal protection rights was caused by a failure to train. *See Parrish*,

594 F.3d at 997 (stating elements for failure to train claim).

D. Secretary of State Mark Ritchie's Claim of Sovereign Immunity

Defendant Secretary of State Mark Ritchie also claims the complaint must be dismissed as against him because he is immune from suit under the Eleventh Amendment. Because the Court finds the Plaintiffs have failed to state a claim on which relief can be granted, the Court does not reach Ritchie's claim of sovereign immunity. *See Beebe*, 578 F.3d at 763 n.14.

III. CONCLUSION

The Court concludes that section 211B.11 and the Election Day Policy are constitutional. The "right to vote freely for the candidate of one's choice is the essence of a democratic society," *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), and Minnesota's strong interest in creating a neutral zone where individuals can vote free from external influence is reasonably furthered by restricting the expression of political views within the narrow confines of the polling place. Plaintiffs have failed to state a claim on which relief can be granted based on the constitutional infirmity of section 211B.11, the Election Day Policy, or on any of the alleged actions taken by these Defendants.

Based on the files, records, and proceedings herein, and for the reasons stated above, IT IS ORDERED THAT:

1. The Defendants' motions to dismiss [Docket Nos. 43, 48, 51] are GRANTED.

2. This action is DISMISSED WITH PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: April 29, 2011

s/ Joan N. Ericksen
JOAN N. ERICKSEN
United States District Judge

Appendix F-1

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 11-2125

Minnesota Majority, et al.

Appellants

v.

Joe Mansky, in his official capacity as the Elections Manager for Ramsey County, et al.

Appellees

Appeal from U.S. District Court for the
District of Minnesota - Minneapolis
(0:10-cv-04401-JNE)

ORDER

The petition for rehearing *en banc* is denied. The petition for panel rehearing is also denied.

Judge Smith and Judge Shepherd would grant the petition for rehearing *en banc*.

May 07, 2013

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Appendix G-1



TEA PARTY PATRIOTS

Tea Party T-Shirts, Apparel & Hats



Men's Red Remember in November T-Shirt



Men's Red Gadsden T-Shirt



Men's Navy Polo Shirt

Liberty

Men's White Liberty T-Shirt

Kid's White Logo T-Shirt



Men's Blue Logo T-Shirt

Men's Red Logo T-Shirt

Men's White Logo T-Shirt

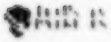


Men's Black Shield T-Shirt

Appendix H-2



Men's Red Principles T-Shirt



Men's White Long Sleeve Logo T-Shirt



Women's White Logo T-Shirt



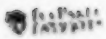
Women's Black Shield T-Shirt



Men's White 912 Event T-Shirt



Men's Red 912 Event T-Shirt



Women's White Visor



Red Logo Hat



Black Shield Hat

Ramsey County Elections
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Email: elections@co.ramsey.mn.us

Phone: 651.266.2171
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October 30, 2010

TO: Ramsey County Head Election Judges

FROM: Joseph Mansky
Ramsey County Elections Manager

SUBJECT: DISPLAYING CAMPAIGN MATERIALS IN THE POLLING PLACE

Please use the following process when dealing with an individual who is displaying political or campaign material in the polling place.

1. Minnesota law prohibits persons from wearing "political badges, political buttons, or other political insignia" or displaying campaign material within the polling place.

2. Election judges have the authority to decide what is "political." Examples include, but are not limited to:

   - Any item including the name of a political party in Minnesota, such as the Republican, DFL, Independence, Green or Libertarian parties.

- Any item including the name of a candidate at any election.

- Any item in support of or opposition to a ballot question at any election.

- Issue oriented material designed to influence or impact voting (including specifically the "Please I.D. Me" buttons).

- Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on).

3. If a person is wearing political material, you should do the following:

   - Explain that the state election law prohibits displaying political materials in the polling place. (Minnesota Statutes 211B.11, subdivision 1.)

   - Ask the individual to either cover up or remove the political material while in the polling place.

   - If they refuse, explain that eligible voters will be allowed to vote, but any refusal will be recorded and referred to appropriate authorities.

4. Even if a voter refuses to do so, you must permit any eligible voter to receive a ballot and vote.

5. Record the name and address of a voter from the polling place roster in the daily journal, along with a brief description of the item (button, hat, t-shirt, etc.) that the voter refused to remove or cover up.

6. Election judges and official challengers are prohibited from displaying political or campaign material in the polling place. If they refuse to remove the political or campaign material, you can ask them to leave.

If you have any questions about this matter, please contact the Elections office or your city clerk.